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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 28405

TRANS WORLD AIRLINES, INC.,
Plaintiff-Appellee,

against

HOWARD R. HUGHES,
Defendant,

and

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Defendants-Appellants.

APPENDIX TO BRIEF OF DEFENDANTS-APPELLANTS HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY

Volume I — Pages A-1 to A-470

CHESTER C. DAVIS, Esq.,
Attorney for Defendants-Appellants,
Hughes Tool Company and
Raymond M. Holliday,
120 Broadway,
New York 5, N. Y.

Dated: September 9, 1963

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellee,* against HOWARD R. HUGHES, *Defendant,* and HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants-Appellants.*	No. 28405

Summary of Pertinent Docket Entries Pursuant to Rule 15(b).

June 30, 1961—Filed complaint and summons; also filed order that these and other papers be kept under seal.

August 9, 1961—Filed affidavits, etc. and notice of motion by Toolco for order dismissing complaint under Rules 12(b) and 56.

August 14, 1961—Filed opinion #27139 granting Toolco's motion for priority of taking depositions—Herlands, J.

August 23, 1961—Filed order, *inter alia,* adjourning Toolco's motions under Rules 12(b) and 56 until further order of this court—Ryan, J.

August 31, 1961—Filed order referring action to Metzner, J. for all purposes—Ryan, J.

February 8, 1962—Filed pretrial order (a) appointing J. Lee Rankin as Special Master to act in connection with depositions and other discovery proceedings, and (b)

Summary of Pertinent Docket Entries Pursuant to Rule 15(b)

fixing a deposition schedule (deposition of Tillinghast and others to continue in accordance therewith)—Metzner, J.

February 14, 1962—Filed Toolco's Answer and Counterclaims together with order adding additional parties as defendants.

February 26, 1962—Filed notices of motions by additional defendants for revising the schedule of depositions.

March 6, 1962—Filed pretrial order of March 5, 1962 re priority of discovery—Metzner, J.

July 12, 1962—Filed pretrial order, *inter alia*, reaffirming Toolco's priority in taking depositions—Metzner, J.

September 26, 1962—Filed affidavit and notice of motion by Toolco for an order directing Rule 16 proceedings.

January 10, 1963—Filed pretrial order of Metzner, J.: (a) deposition of Hughes to commence on February 11, 1963; (b) Rule 16 application denied without prejudice to a renewal 30 days after completion of Hughes' deposition; (c) Toolco to produce attorney-client communications; (d) TWA to answer Toolco's interrogatories within 60 days after Hughes' deposition.

January 18, 1963—Filed affidavit and notice of motion (dated January 14) by Toolco for Rule 30(b) relief re Hughes' deposition, alternatively to bring on its motion to dismiss, and for stay of order that it produce attorney-client communications pending determination of its motion to dismiss or until such time that it may obtain appellate review.

January 19, 1963—Filed opinion #28550 of Metzner, J., denying Toolco's motions filed January 18, 1963, except that date in January 10 order for production of attorney-client communications amended to January 22, 1963.

Summary of Pertinent Docket Entries Pursuant to Rule 15(b)

January 22, 1963—Filed stipulation extending time for production of documents until January 23, 1963; filed Toolco's notice of appeal from order of January 10, 1963 as modified by order of January 19, 1963.

January 23, 1963—Hearing held before Court of Appeals for Second Circuit (Lumbard, C. J., Kaufman and Marshall, JJ.)—Appeal dismissed on motion of appellees and leave to file petition for writ of mandamus or prohibition denied.

February 6, 1963—Pretrial hearing held; filed memorandum endorsed on motion filed January 18, 1963, denying Toolco's motion to dismiss, formal opinion to follow—Metzner, J.

February 7, 1963—Filed opinion #28588 re denial of Toolco's motion to dismiss—Metzner, J.

February 8, 1963—Filed Toolco's Notice of Position; pretrial hearing held.

February 11, 1963—Filed TWA's answer to Toolco's counterclaims.

February 13, 1963—Filed affidavit, exhibits and Toolco's notice of motion for an order granting reargument—re decision of court on February 6, 1963 on its motion to dismiss.

February 18, 1963—Filed affidavit and order to show cause re judgment for TWA on its complaint, etc.

February 21, 1963—Filed notice amending Toolco's notice of motion filed February 13, 1963; Pretrial hearing held at which time Judge Metzner denied Toolco's amended motion filed February 13 and 21, 1963 as amended.

Summary of Pertinent Docket Entries
Pursuant to Rule 15(b)

February 25, 1963—Filed endorsements on motion papers filed February 13 and 21, 1963 by Toolco, *inter alia*, denying reargument, denying a reference of certain questions to the CAB, and denying a stay of proceedings—Metzner, J.

May 2, 1963—Pretrial hearing held re motions filed February 18, 1963.

May 3, 1963—Filed opinion #28826 ordering, *inter alia*, that a judgment by default shall be entered in favor of TWA against Toolco and Holliday on the complaint, damages to be determined by Special Master—Metzner, J.

May 13, 1963—Filed (with Court of Appeals) Application of Toolco and Holliday for leave to appeal interlocutory order of May 3, 1963.

June 11, 1963—Filed notice of appeal re order entered May 3, 1963, pursuant to leave granted by Court of Appeals on June 6, 1963.

TWA Complaint

[4]

[CAPTION] Civil Action No. 61-2324

COMPLAINT

Plaintiff, by its attorneys, Cahill, Gordon, Reindel & Ohl, for its complaint herein against the above-named defendants, respectfully alleges:

FIRST CLAIM

I.

Nature of Claim and Jurisdiction of Court

1. This complaint is filed and this action instituted against defendants under Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26 (1958)) in order to declare, to prevent and restrain, and to recover damages resulting from, the violation by defendants, as hereinafter alleged, of Section 1 of the Sherman Act (15 U.S.C. § 1 (1958)), of Section 2 of the Sherman Act (15 U.S.C. § 2 (1958)), of Section 3 of the Clayton Act (15 U.S.C. § 11 (1958)), and of Section 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. (1946 Ed.) § 18).

[5]

II.

Description of Parties

2. Plaintiff (hereinafter sometimes called "TWA") is a corporation organized in 1934 and existing under the laws of the State of Delaware and maintains its principal executive offices in the City of New York. TWA is the only air carrier authorized under Certificates of Public Convenience and Necessity granted by the Civil Aeronautics Board to provide both transcontinental and transatlantic scheduled air transportation in the interstate and foreign commerce of the United States, and is now providing such transportation, in competition at various points with various other United States Flag and foreign-flag air carriers.

TWA Complaint

3. Defendant Hughes Tool Company (hereinafter sometimes called "Toolco") is a corporation organized and existing under the laws of the State of Delaware, has assets of several hundred million dollars, transacts business within the Southern District of New York, and was and is engaged in interstate commerce, *inter alia,* since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft to air carriers in various other states for use in interstate and foreign commerce.

4. Defendant Howard R. Hughes (hereinafter sometimes called "Hughes") was, throughout the period of the matters hereinafter complained of, and is an officer and the sole stockholder of Toolco and directed, controlled and dominated its activities.

[6] 5. Defendant Raymond M. Holliday (hereinafter sometimes called "Holliday") for some years past was and is the chief operating officer of Toolco in charge of TWA affairs and since 1959 and to date has been a director of TWA.

6. Atlas Corporation, named herein as a co-conspirator but not as a defendant (hereinafter called "Atlas"), is a corporation organized in 1936 and existing under the laws of the State of Delaware. Northeast Airlines, Inc., a corporation organized and existing under the laws of the State of Massachusetts (hereinafter called "Northeast"), is an air carrier engaged in the business of providing scheduled air transportation in interstate commerce, and for some years past has been and is now controlled by Atlas, by means, *inter alia,* of the ownership by Atlas of 58% of the stock of Northeast. The defendant Hughes for some years past has had the beneficial ownership of Voting Trust certificates issued with respect to 11% of the Common Stock of Atlas.

TWA Complaint

III.

Commerce Involved

7. The trade and commerce involved in this action concerns:

(a) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States, as "aircraft", "air carrier" and "air transportation" are defined in 49 U.S.C. § 1301.

[7] (b) The furnishing of jet-powered aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States.

(c) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA for use in the business of air transportation in interstate and foreign commerce of the United States.

(d) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, such pairs of cities being those pairs of cities between which in each instance TWA provides more than 60% of the scheduled air transportation which is provided by all United States-Flag air carriers.

(e) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, and between the United States and certain foreign cities, such pairs of locations being those pairs of locations between which in each instance

TWA provides the only scheduled air transportation provided by United States-Flag air carriers.

[8] (f) The financing in interstate commerce of the United States of the acquisition by sale, lease or other means of aircraft for use by TWA in air transportation in interstate and foreign commerce of the United States.

8. The nature and extent of such trade and commerce with respect to TWA is more fully described as follows:

(a) TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States. The scheduled air transportation provided by TWA in the United States has been and is a substantial proportion of that provided by all air carriers within the United States. During the periods set forth below, TWA provided the percentages set forth below of all scheduled passenger miles provided by all domestic scheduled trunk air carriers within the United States:

Year 1955	14.9%
Year 1956	15.1%
Year 1957	14.9%
Year 1958	15.0%
Year 1959	16.3%
Year 1960	15.2%

(b) Since 1946, TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia. The scheduled air transportation provided by TWA between the United States and certain foreign cities has been and is a substantial proportion of that provided by all [9] United States-Flag air carriers and of that provided by all air carriers. During the periods set forth below, TWA provided the percentages set forth below of all passenger miles provided by

scheduled United States-Flag air carriers between the United States and foreign cities:

	% of U.S. Flag
Year 1955	13.6%
Year 1956	12.9%
Year 1957	12.0%
Year 1958	12.5%
Year 1959	9.5%
Year 1960	12.5%

(c) In its operations, TWA has used, and is using, both in its domestic operations and in its international operations, a substantial proportion of all of the aircraft, both jet-powered and otherwise, operated by all scheduled air carriers operating within the United States, by all of the United States-Flag scheduled air carriers operating between the United States and foreign cities and by all of the scheduled air carriers operating between the United States and foreign cities.

(d) TWA provides and has provided a substantial proportion of the scheduled transportation in jet-powered aircraft provided by all carriers within the United States, by all United States-Flag air carriers between the United States and foreign cities and by all air carriers between the United States and foreign cities. In 1959, TWA provided over 1.1 billion passenger miles of scheduled jet air transportation.

[10] (e) The requirements of TWA for commercial jet-powered aircraft constitute and have constituted a separate and distinct market for United States aircraft manufacturers by reason, *inter alia*, of design and flight characteristic requirements, fleet and operating requirements, and the structure of the domestic and foreign routes of TWA.

(f) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial aircraft made by United States aircraft manufacturers. For example, during the period 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of $100,000,000, which aircraft were manufactured by manufacturers in various states of the United States.

(g) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial jet-powered aircraft, both long-range and otherwise, made by United States manufacturers. For example, TWA currently has more than $150,000,000 worth of jet-powered aircraft on order.

(h) TWA constitutes and has constituted a dominant portion of a substantial market for aircraft, that is, the market for aircraft for use between certain pairs of United States cities and between the United States and certain foreign cities. In 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, such transportation amounting to 332,000,000 passenger miles [11] accommodating 391,000 passengers and accounting for approximately 7.8% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 90% and 100% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to over 680,000,000 passenger miles accommodating over 1,000,000 passengers and accounting for approximately 16.0% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 80% and 90% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transpor-

tation by TWA amounting to over 331,000,000 passenger miles accommodating 649,000 passengers and accounting for approximately 7.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 70% and 80% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 417,000,000 passenger miles accommodating 412,000 passengers and accounting for approximately 9.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 60% and 70% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 218,000,000 passenger miles accommodating 251,000 passengers and accounting for 5.1% of the domestic passenger miles provided by TWA in 1959. [12] Thus, in 1959, TWA provided more than 60% of the passenger miles between certain pairs of United States cities, such transportation by TWA amounting to almost 2 billion passenger miles accommodating more than 2.7 million passengers and accounting for 46.5% of the domestic passenger miles provided by TWA in 1959. TWA is the only United States-Flag air carrier which is now authorized to provide scheduled air transportation of passengers between the United States and any of the following cities: Athens, Geneva, Zurich, Milan, Algiers, Tunis, Cairo, Tel Aviv, Dahran, Bombay and Colombo. Long-range aircraft are used by TWA between the United States and the above-named foreign cities; all other aircraft used by TWA are usable between one or more of the pairs of United States cities between which TWA provides the only scheduled air transportation. TWA in 1959 provided the following percentages of the scheduled air transportation measured by number of transatlantic passengers provided by all air

carriers between the United States and the three principal ports of entry (London, Paris and Lisbon) into Europe, Africa and Southwest Asia: United States-London, 11%; United States-Paris, 17%; United States-Lisbon, 32%.

(i) In 1960, operating revenues of TWA were substantially in excess of $300,000,000; net income was in excess of $6,000,000. During the first quarter of 1961, TWA had an operating loss of approximately $13,000,000 and a net loss of approximately $9,000,000.

[13]

IV.

The Offenses Charged

9. Beginning in or about the year 1939 and continuing up to and including the date of the filing of this complaint, the defendants, Atlas and other persons acting for each of them have been and are now engaged in:

(a) A combination and conspiracy to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act;

(b) A combination to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act by providing financing of the acquisition by plaintiff of aircraft, including jet-powered aircraft, only upon the condition that plaintiff acquire all such aircraft from defendant Toolco;

(c) A combination to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act by requiring plaintiff to boycott all suppliers of aircraft, including jet-powered aircraft, except defendant Toolco;

(d) A combination and conspiracy to monopolize a substantial segment of the interstate and foreign

trade and commerce of the United States in violation of Section 2 of the Sherman Act;

(e) An attempt to monopolize a substantial segment of the interstate and foreign trade and commerce [14] of the United States in violation of Section 2 of the Sherman Act;

(f) Sales and leases of jet-powered aircraft on the condition, agreement and understanding that the purchaser or lessee shall not buy or lease the goods of a competitor or competitors of the vendor or lessor, in violation of Section 3 of the Clayton Act; and

(g) Acquisitions of the stock of a corporation in violation of Section 7 of the Clayton Act.

10. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of restraining and monopolizing the trade and commerce described above. It was the intent of the defendants and Atlas, *inter alia:*

(a) That Toolco would become a dominant source of supply of jet-powered aircraft to air carriers;

(b) That the defendants would seize control over TWA and its business and use such control for their own purposes;

(c) That Toolco would become the sole source of supply of jet-powered aircraft to TWA;

(d) That defendants would have TWA as a captive market and would supply the requirements of TWA for aircraft, including jet-powered aircraft, upon terms advantageous to themselves;

[15] (e) That the requirements of TWA for aircraft, including jet-powered aircraft, would be enlarged for the benefit of defendants and Atlas by various means;

(f) That suppliers of aircraft to TWA other than the defendants would be boycotted and foreclosed from the trade and commerce hereinbefore alleged;

(g) That defendants would supply TWA with the aircraft essential to its business only on the condition that TWA would accept such financing arrangements relating to the aircraft as the defendants dictated, and in turn that defendants would allow TWA to procure financing essential for the acquisition of the aircraft it needed only on the condition that TWA would accept such aircraft as the defendants dictated; and

(h) That the defendants and Atlas would obtain substantial profits for themselves, at the expense of TWA and other air carriers, as the result of restrictions upon competition in the trade and commerce hereinbefore alleged.

V.

Acts Committed Prior to December 1960

11. Commencing in or about the year 1939 and at various times thereafter, Toolco, pursuant to an understanding with and at the direction of Hughes, acquired Common Stock of TWA. By such acquisitions, Toolco acquired more than 78% of such Common Stock. The purpose and the [16] effect of the acquisitions so made and the use by defendants of the stock so acquired have been to foreclose competing suppliers of aircraft from the opportunity for supplying aircraft to TWA.

12. Since in or about 1955 one of the most important single factors in the operation of and competition among air carriers engaged in air transportation in interstate and foreign commerce has been the prospect, introduction and eventual utilization of jet-powered aircraft.

13. By 1955, aircraft manufacturers (including Boeing Company, hereinafter called "Boeing", and Douglas Air-

craft Company, Inc., hereinafter called "Douglas") had prepared — to the general knowledge of the air carrier industry — plans and drawings and otherwise had undertaken preparations for the manufacture by themselves of jet-powered aircraft intended for use by air carriers. Beginning in or about 1955, many air carriers devoted substantial efforts of their own (a) to determining whether the jet-powered aircraft then being developed by Boeing, Douglas or others could be best utilized by them in their respective operations, and (b) to obtaining jet-powered aircraft suitable for their needs, including the participation by them in the design of such aircraft. Boeing and Douglas each contemplated the manufacture of and did ultimately manufacture jet-powered aircraft for short-range flights and for medium and long-range flights suitable for the respective needs of such air carriers.

[17] 14. Prior to 1955, defendants and General Dynamics Corporation (hereinafter called "Convair") entered into an arrangement for the joint development of a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to air carriers, including TWA. In furtherance of that arrangement, the defendants required TWA to provide to the defendants and Convair the use of TWA's highly skilled engineering and other personnel, who were to participate and did participate in the design and development of the aircraft to be manufactured by Convair. It was the intention of defendants that TWA would serve as a captive market for such aircraft which Toolco would procure to supply to TWA and other air carriers. A jet-powered aircraft, designated as Model 18, was so designed. In 1955, the defendants and Convair concluded that the continued development of, and manufacture of, Model 18 was not in their respective self-interests, and the program for its development and production was then abandoned.

15. Prior to May 1, 1956, the defendants also entered into a plan under which Toolco would itself commence the

manufacture of a jet-powered aircraft with design and range characteristics making it suitable for use on both domestic and transatlantic routes. The defendants intended that Toolco would furnish this aircraft, to be known as the "Golden Arrow", by sale, lease or other means both to TWA and to other air carriers. Activities looking to such manufacture by Toolco of the [18] "Golden Arrow" were actively pursued until in or about mid-1956, and were thereafter abandoned by the defendants.

16. In or about October 1955, at approximately the time of the decision to abandon the Model 18, the first firm order for jet-powered aircraft was placed with a United States aircraft manufacturer by a United States-Flag air carrier; that order was placed with Boeing by Pan American World Airways, Inc., TWA's principal international competitor. In the ensuing month and a half, principal United States and foreign air carriers — including major competitors of TWA — placed orders for jet-powered aircraft with Boeing or Douglas. These air carriers ordered 59 jet-powered aircraft from Boeing and 95 jet aircraft from Douglas, which orders were scheduled for delivery in 1959 and 1960.

17. During this period when other United States-Flag air carriers were placing orders for jet-powered aircraft, and thereafter, the defendants caused and directed TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise, of any jet-powered aircraft. In or about February 1956, the defendants arranged for Toolco to place orders for 15 jet-powered aircraft with Boeing. Thereafter, the defendants arranged for Toolco to place orders with Boeing for an additional 18 jet-powered aircraft. In or about April 1956, the defendants arranged for Toolco to place orders for at least 30 Model 880 jet-powered aircraft to be manufactured by Convair.

[19] 18. The purchase orders placed by Toolco with Convair and Boeing reserved to Toolco the privilege of assigning to TWA the right to acquire the jet-powered aircraft so

purchased. Despite repeated requests by TWA, Toolco refused throughout the period of 1956 to 1960 to assign to TWA the rights to acquire such aircraft. In or about June, 1959, defendants caused six of the Boeing jet-powered aircraft then on order by Toolco to be diverted to the principal transatlantic competitor of TWA.

19. During the period 1956 to 1960, the defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco, but the defendants prevented TWA from arranging with Convair for certain design modifications which were desired by TWA and which would not have interfered with the scheduled dates of delivery. During the year 1960 the defendants also prevented and restricted TWA from making acceptance and test flights from time to time of various specific Convair Model 880 aircraft then on order with Convair by Toolco.

20. During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers [20] of jet-powered aircraft to TWA other than defendants, the opportunity for selling or leasing jet-powered aircraft to TWA.

21. Prior to May 1960, the exact date being unknown to TWA, Atlas, with knowledge of the conspiracy and other violations of antitrust laws herein alleged, then joined with the defendants in said violations, and agreed to cause Northeast to submit to TWA a proposed agreement of merger upon terms advantageous to the defendants and

Atlas and disadvantageous to TWA. The purposes of defendants and Atlas in proposing such a merger were

(a) To enlarge TWA's requirements for new aircraft, and thereby to enlarge the demand in the market from which the defendants had foreclosed and would continue to foreclose all other suppliers, and

(b) For Atlas to obtain stock of TWA on terms advantageous to Atlas and its stockholders, including defendant Hughes.

Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the East Coast of the United States and Canada. In 1959 Northeast's revenue passenger miles totaled 519,000,000 and its total assets exceeded $35,000,000.

22. In November 1960, while the proposal for merger was pending, the defendants arranged for the lease by Convair to Northeast of six of the Convair Model 880 [21] aircraft which Toolco had ordered from Convair. Among the aircraft so leased to Northeast were three aircraft which Toolco previously by an agreement with TWA of May 9, 1960, had assigned to TWA.

23. Subsequent to the acquisition of stock by Toolco in TWA, defendants for reasons of self-interest continuously refused to allow equity financing by TWA except on condition that, as a result of any such financing, Toolco would be enabled to increase its equity position in TWA and instead caused TWA to obtain funds chiefly by means of debt financing. TWA was thus rendered unable to seek the financing it needed for the acquisition of aircraft except upon the approval of defendants. The purpose of the defendants in rendering TWA dependent upon them for such assistance in financing as defendants might choose to provide, and the effects thereof, were, among other things,

(a) to create and maintain control in the defendants of the business of financing the purchase of aircraft for use by TWA, and

(b) to strengthen defendants' control over the acquisition of aircraft by TWA.

24. From 1955 until December, 1960, the defendants used their power over the financing of aircraft thus obtained to compel TWA to acquire aircraft of the type and in the manner dictated by the defendants and used their power over TWA's acquisition of aircraft, obtained as hereinbefore alleged, to compel TWA to obtain financing for the acquisition [22] of such aircraft of the type and in the manner dictated by the defendants.

25. At least as early as 1955, the needs of United States air carriers for the extensive financing required for acquisition of jet-powered aircraft were recognized throughout the air carrier industry and by others, including the defendants.

26. In 1955 and continuously thereafter until December, 1960, the defendants, pursuant to and in furtherance of their plan to control TWA in a manner advantageous to themselves, directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jet-powered aircraft required for the needs of TWA.

27. Commencing in the year 1955 and continuing thereafter, various other air carriers, including competitors of TWA, made appropriate arrangements for the financing of jet-powered aircraft. In 1955 and 1956 various United States air carriers were able to obtain funds at a cost (or interest rate per annum) in 1955 of 4%, and in 1956 at costs ranging from 4¼% to 4¾%.

28. In 1955 and thereafter for a period of several years, the defendants discussed with others various proposals for the financing of jet-powered aircraft, but the defendants did not make arrangements for such financing [23] nor allow TWA to make such arrangements until December 1960, at which time the prevailing cost of funds (or interest rates) for debt financing was approximately 6-6½%.

VI.

The Financing and Acquisition of Jet Aircraft by TWA in and since December 1960

29. In connection with TWA's acquisition from Toolco in December 1960 of certain jet-powered aircraft and the rights to obtain certain additional jet-powered aircraft from Boeing and Convair and in connection with other financial transactions between TWA and Toolco, TWA delivered to Toolco a note dated December 30, 1960 for $100,000,000, carrying an interest rate of 6½%, which note was subordinated to the indebtedness of TWA to various banks and insurance companies for additional funds needed by TWA for the purchase of these aircraft.

30. As part of the arrangements with Toolco above described, TWA agreed to offer to its stockholders not less than $100,000,000 of its subordinated income debentures, with attached warrants to purchase common stock of TWA; the debentures were subordinated to TWA's senior indebtedness to banks and insurance companies. Toolco agreed to purchase, not later than three business days after expiration of the subscription offer, a principal amount thereof equal to the excess of $100,000,000 over the principal amount purchased by others in the offering; Toolco also was given the option [24] to purchase, not later than three business days after the expiration of the subscription offer, all or any part of the debentures not purchased by stockholders pursuant to the subscription offer.

31. As part of the arrangements with Toolco and with banks and insurance companies as above described, Toolco, TWA and three Voting Trustees (Ernest R. Breech, Irving S. Olds and defendant Holliday) executed an agreement dated as of December 15, 1960. The agreement provided that the TWA stock owned and to be owned by Toolco would be placed in a Voting Trust, pursuant to which the Voting Trustees, acting by a majority vote, were empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and accordingly were authorized to elect directors who would be in control of TWA's management and policies.

32. The creation of the Voting Trust above described was required by the financial institutions as a condition to making loans to TWA of $165,000,000 also needed for the purchase of the aforesaid aircraft, and which loans were evidenced by a like amount of senior notes of TWA.

33. The Voting Trust, in which Toolco's TWA stock has been deposited pursuant to the terms of the Voting Trust, provides in Article Thirteenth thereof that it shall terminate on December 15, 1970, unless previously terminated or extended as provided therein.

[25] 34. Thereafter and in early 1961, at a meeting of stockholders of TWA, the Voting Trustees, by majority vote, and other stockholders of TWA entitled to vote duly elected a Board of Directors of TWA and said Board of Directors elected a new President of TWA.

35. In March 1961, after careful consideration of TWA's requirements for additional jet-powered aircraft, the officers of TWA who were concerned with such matters unanimously recommended to the Board of Directors of TWA that TWA's immediate needs for jet-powered aircraft would best be served by the acquisition of 20 aircraft, Boeing Model 707 131-B, and 6 aircraft, Boeing Model 707 331-B. The Board of Directors authorized the purchase of such aircraft. On April 30, 1961, TWA and Boeing agreed on the purchase of these aircraft, with related spare parts and equipment, for delivery in 1962 at an ultimate cost estimated at approximately $187,500,000. Of this amount, TWA expects to provide approximately $40,500,000 from its own funds and to borrow $147,000,000. The borrowing is currently being negotiated with certain insurance companies and banks.

VII.

Acts Committed Subsequent to 1960

36. On and after December 31, 1960, the defendants, despite the execution of the Voting Trust above described and the deposit of Toolco's TWA stock in said Trust, con-

tinued and renewed the offenses described in Paragraphs 9 through 28 above, as hereinafter alleged.

[26] 37. Since during the month of May 1961, the defendants have insistently demanded of TWA that TWA not purchase from Boeing the aircraft described above, but instead that TWA purchase from Toolco 13 Convair Model 990 aircraft which Toolco had previously agreed to purchase from Convair, despite the decision of TWA's Board of Directors, which was known to defendants, that such Convair aircraft are not as suitable for TWA's needs as the aircraft which TWA wishes to purchase and is purchasing from Boeing.

38. During the month of May 1961, defendants wrongfully attempted to coerce TWA into purchasing Convair aircraft from Toolco by maliciously asserting for the first time (a) that TWA might have an obligation to purchase such aircraft from Toolco, (b) that the management of TWA would be derelict in its duty to Toolco if it failed to make such purchases, (c) that TWA's management was without authority to reach decisions on behalf of TWA with respect to such purchases or alternatives thereto, and (d) that the proposed purchases of aircraft from Boeing were not in the interest of TWA. Defendants also sent telegrams and other urgent messages to TWA, threatening TWA, its directors, the Voting Trustees and the financial institutions lending money to TWA with the institution of a suit or suits against TWA, its management, its directors and the Voting Trustees unless TWA decided to purchase and did purchase the Convair aircraft.

[27] 39. During the months of May 1961, the defendants also warned Boeing that its contract with TWA was not binding upon TWA. The defendants hereby maliciously sought to interfere with, to impair and to disrupt the contractual relationship, known to the defendants, between Boeing and TWA, to the advantage of defendants and disadvantage of TWA.

40. The agreements made in December 1960, relating to the financing of TWA's purchase of jet aircraft, required, among other things, that TWA make, not later than May 31, 1961, a public offering of rights to purchase its subordinated income debentures with common stock warrants. In accordance with the provisions of those agreements, the Board of Directors of TWA approved the filing with the Securities and Exchange Commission of a Registration Statement relating to the proposed public offering and such Registration Statement was filed with the Securities and Exchange Commission on March 30, 1961.

41. TWA, in order to comply with its obligation to make the proposed public offering prior to May 31, 1961 as agreed, requested the Securities and Exchange Commission to accelerate the effective date of the Registration Statement to May 18, 1961. Thereupon defendants filed objections with the Securities and Exchange Commission to the request of TWA and demanded that the proposed offering be deferred on the ground, among others, that Toolco had decided for the first time on May 10, 1961 to make a public distribution of the debentures which were being [28] offered by TWA and which were to be acquired by Toolco pursuant to the provisions of the prior agreements.

42. Defendants further demanded that certain amendments be made to the Registration Statement in order to set forth, among other things, certain contentions of defendants then made for the first time by defendants, including, among others:

(a) that notwithstanding the admitted legal power of the Voting Trustees to act, the Voting Trust could not be given effect according to its terms so as to enable TWA to be operated independently of the wishes of the defendants;

(b) that Toolco's position was that it had been compelled to enter into the Voting Trust under conditions which would warrant an immediate termination of the Voting Trust;

(c) that Toolco was considering an attempt to enjoin the consummation of the Boeing purchase transaction above described or taking action for damages against the persons responsible for the Boeing agreements; and

(d) that there might be some basis upon which Toolco could assert an equitable right to sell to TWA the Convair aircraft previously ordered by Toolco.

[29] 43. After considering the contentions so advanced by defendants, the Securities and Exchange Commission accelerated the effective date of the Registration Statement, as amended, so as to make the Registration Statement effective on May 24, 1961.

44. After the effective date of the Registration Statement and while the public offering was in progress, the defendants publicly announced that they proposed to sell up to 85% of the rights to purchase subordinated debentures which defendants were obligated to acquire under the terms of the aforesaid agreements, with the result that there was a substantial decrease in the prices at which such rights could be sold and were sold to the public.

45. The contentions made by the defendants as alleged in Paragraph 42 above and the public announcement made by the defendants as alleged in Paragraph 44 above were made for the purpose and with the intention that they would receive wide public circulation, would substantially decrease the prices at which the aforesaid rights could be sold to the public, and would thereby impair and discourage TWA's efforts to obtain financing from sources other than the defendants, and would enable the defendants to continue to condition the furnishing of financing to TWA by defendants upon TWA's acquiring jet-powered aircraft only from defendant Toolco.

46. Defendants also warned the insurance companies and banks from which TWA was then attempting to ar-

range the immediate borrowing of $30,000,000 of short-term [30] funds and the borrowing of $147,000,000 of secured funds required for the purchase of the Boeing aircraft as hereinabove alleged, that the Voting Trust was invalid and that any such financing by them would be invalid. Such warnings were made by defendants maliciously and wilfully and with the intent and purpose of disrupting and discouraging TWA's efforts to obtain such financing. As a result of such warnings, at least one of the proposed lenders has completely withdrawn from all negotiations for the proposed financing, and TWA's efforts to obtain such financing have been handicapped.

47. In and since the month of May 1961, defendants and Atlas, with knowledge of the conspiracy and offenses hereinabove alleged, have demanded that TWA accept the proposed merger with Northeast on the terms previously directed by the defendants, which terms were and are not advantageous to TWA but which if consummated would be in the interests of the defendants and Atlas. The defendants have sought the merger on such terms for the purpose of increasing their total direct and indirect stock ownership in TWA and of increasing the number of aircraft to be supplied by them to TWA, by enlarging the business of TWA.

48. The stock of TWA acquired by defendant Toolco has thus been used by the defendants since December 31, 1960 in an effort to restrain, restrict and control TWA. Despite the existence of the Voting Trust, the defendants and Atlas have attempted to require TWA to obtain aircraft exclusively [31] from the defendants, to prevent TWA from obtaining aircraft essential to its business from Boeing, to prevent TWA from obtaining financing for the acquisition of such aircraft except on terms dictated by defendants, to require TWA to merge with another airline upon terms disadvantageous to TWA, to enlarge the defendants' indirect stock interest in TWA and to regain control over TWA and its entire business.

VIII.

Effects of Offenses

49. As the result of the offenses hereinabove alleged,

(a) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means to TWA and other air carriers has been restrained and monopolized.

(b) Competition among aircraft manufacturers and others in the furnishing of jet-powered aircraft by sale, lease or other means to TWA and other air carriers has been restrained and monopolized.

(c) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means to TWA has been restrained and monopolized.

[32] (d) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means for use by scheduled air carriers between those cities in the United States, and between the United States and those foreign cities, between which points TWA provides the only scheduled air transportation by a United States-Flag air carrier, has been restrained and monopolized.

(e) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means for use by scheduled air carriers between those cities in the United States, between which cities TWA provides more than 60% of the scheduled air transportation provided by United States-Flag air carriers, has been restrained and monopolized.

(f) Competition among United States-Flag scheduled air carriers and among all scheduled air carriers has been, is now being and will be injured.

(g) As a result of past, present and prospective injuries to the second largest United States-Flag air

carrier operating outside of the United States, the national interest of the United States has been and is being injured.

50. TWA has been immediately injured in its business by Toolco's acquisition of TWA's stock, in that [33] TWA has been denied the right freely to acquire aircraft necessary to its operations and has received such aircraft as were made available to it in an untimely manner. TWA has further been immediately injured in its business by Toolco's denial to TWA of the authority or opportunity to acquire jet-powered aircraft from any person or corporation other than Toolco. Unless the relief TWA requests is granted, it will suffer further and irreparable injury.

51. TWA has been further and immediately injured in its business in that defendants have supplied TWA with aircraft, including jet-powered aircraft, essential to its business upon the condition that TWA accept such financing arrangements relating to such aircraft as the defendants chose to dictate, and further in that defendants have allowed TWA to procure financing essential for the acquisition of aircraft only upon the condition that TWA would accept such aircraft as the defendants dictated, and unless the relief TWA requests is granted TWA will suffer further and irreparable injury.

52. TWA has further been injured in the following manner:

(a) TWA was prevented from obtaining jet-powered aircraft and was deprived of opportunity for adequate use of jet-powered aircraft during the years 1958, 1959, 1960 and to date with a resultant loss in profits. That loss may be substantially increased as a result of defendants' continuing actions heretofore described.

[34] (b) TWA was foreclosed from the opportunity for early sales of its obsolescent piston engine aircraft, causing loss to TWA.

(c) TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss by virtue of the greater cost of borrowing it ultimately experienced.

(d) TWA's ability to obtain financing for its needs was substantially impaired.

(e) TWA's good will in its business of serving passengers throughout the world was diminished.

53. As additional results of the offenses hereinabove alleged, TWA further has been immediately and irreparably injured in that:

(a) TWA's ability to obtain debt and equity financing for its future financial needs has been seriously impaired.

(b) TWA's efforts to obtain both short-term and long-term financing for the purchase of the Boeing aircraft which it has contracted to buy have been seriously handicapped.

(c) TWA's ability to obtain both short-term and long-term financing for the jet-powered aircraft which it should order in the near future has been impaired.

(d) TWA's ability at this time safely to order additional jet-powered aircraft which it urgently needs has been handicapped.

[35] (e) The date when additional jet-powered aircraft will be available to and will be in use by TWA has been deferred.

(f) The period of disruption caused by the transition from non-jet to jet operation has been extended.

(g) The coordination of the change from non-jet to jet operations has been disrupted over an extended period of time.

(h) The management and business of TWA has been disrupted over an extended period of time.

54. As a result of the foregoing, TWA has been injured in its business and property in an amount estimated to be in excess of $35,000,000, and which amount may become substantially greater as a result of defendants' continuing violations as heretofore described.

55. TWA has no adequate remedy at law.

SECOND CLAIM

I.

Nature of Claim and Jurisdiction of Court

56. Plaintiff's claim arises from the violations by the defendants of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. In all other respects, the nature of the claim, the jurisdiction of the Court and the [36] descriptions of the parties and of the commerce involved are as hereinbefore alleged in Paragraphs 1 through 8 hereof and such Paragraphs are hereby realleged.

II.

Offenses Charged

57. Since on or about December 31, 1960 and continuing to the date of the filing of this complaint, the defendants, Atlas and others acting for each of them have been and are now engaged in a combination and conspiracy to restrain and monopolize and an attempt to monopolize a substantial segment of the interstate and foreign commerce of the United States in violation of Sections 1 and 2 of the Sherman Act, and defendant Toolco has used the stock of TWA acquired by Toolco so as to restrain commerce and tend to create a monopoly in a line or lines of commerce in violation of Section 7 of the Clayton Act.

TWA Complaint

58. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in Paragraph 57, was a part thereof and was done with the purpose and intent as hereinbefore alleged in Paragraph 10 hereof, and Paragraph 10 is hereby realleged.

III.

Background of the Offenses

59. Paragraphs 11 through 35 hereof are hereby realleged as the background of the offenses charged.
[37]

IV.

Acts Committed

60. Paragraphs 36 through 48 hereof are hereby realleged.

V.

Effects of Offenses

61. As results of the offenses hereinabove alleged, TWA has been immediately and irreparably injured as and in the manner hereinbefore alleged in Paragraph 53 hereof, and such Paragraph is hereby realleged.

62. If the defendants continue the offenses hereinbefore alleged and succeed in their purpose and plan, the further results and effects thereof will be those heretofore alleged as already having occurred in Paragraphs 49, 50, 51 and 53, and such results and effects are hereby realleged as prospective results and effects.

63. As a result of the offenses complained of, TWA has been injured in its business and property in a substantial amount which cannot be accurately calculated at this time. Such damages will, as a result of the defendants' continuing violations of the antitrust laws, be substantially increased in the very near future.

TWA Complaint

64. Unless the relief TWA requests is granted, it will suffer immediate, further and irreparable injury. TWA has no adequate remedy at law.

[38]

THIRD CLAIM

I.

Nature of Claim and Jurisdiction of Court

65. Plaintiff's claim arises out of the facts previously alleged in support of the claims hereinbefore stated, and this Court has jurisdiction to grant all relief available under such facts since this Court has jurisdiction, as hereinbefore alleged in Paragraphs 1 and 56, to determine each of the claims hereinbefore stated and arising out of the facts alleged.

II.

Description of Parties and Background of Acts Committed

66. The description of the parties involved is as hereinbefore alleged in Paragraphs 2 through 6 hereof and the background of the acts committed is as alleged in Paragraphs 29 through 35, and such Paragraphs are hereby realleged.

III.

Acts Committed

67. From and after December 31, 1960, the defendants have maliciously and wilfully injured the business of TWA by acts alleged in Paragraphs 37 through 48 hereof, which Paragraphs are hereby realleged.

IV.

Effects of Acts

68. TWA has been injured as and in the manner hereinbefore alleged in Paragraph 53, which Paragraph is hereby realleged.

[39] 69. TWA has been injured in the amount of approximately $10,000,000. Such damages will, as a result of defendants' continuing wrongful acts, be substantially increased in the near future.

70. Unless the relief TWA requests is granted, it will suffer immediate, further and irreparable injury. TWA has no adequate remedy at law.

PRAYER

WHEREFORE, plaintiff prays that this Court order, adjudge and decree:

I.

With Respect to the First and Second Claims Stated Hereinbefore,

(1) That the defendants and Atlas have violated Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act; and, with respect to the first claim only, Section 3 of the Clayton Act;

(2) That the defendants divest themselves of all right, title or interest in the stock of plaintiff;

(3) That the defendants pay to the plaintiff $105,000,000, three-fold the damages sustained by plaintiff, together with costs and attorneys' fees;

(4) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be perpetually enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, (b) from [40] threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants, and (c) from

acquiring or holding any interest, beneficial or otherwise, direct or indirect, in the stock of plaintiff;

(5) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be during the pendency of this suit enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, and (b) from threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants; and

II.

With Respect to the Third Claim Stated Hereinbefore,

(1) That defendants pay to plaintiff compensatory damages in the amount of $10,000,000, and such other and further punitive and exemplary damages as to this Court may seem just and proper;

(2) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active [41] concert or participation with them who receive actual notice of this injunction be, at first during the pendency of this suit, and thereafter perpetually, enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, (b) from interfering with any contract made and entered by TWA and from threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants, and (c) from otherwise interfering with, obstructing or harassing TWA, directly or indirectly, in any activity done by TWA pursuant to the authority vested in its officers and directors; and

III.

That the plaintiff have such other and further relief as to this Court may seem just and proper.

Dated: New York, New York,
June 30, 1961.

CAHILL, GORDON, REINDEL & OHL

By /s/ JOHN T. CAHILL
John T. Cahill, Partner

By /s/ JOHN F. SONNETT
John F. Sonnett, Partner

Attorneys for Plaintiff
80 Pine Street
New York 5, New York

Toolco Answer and Counterclaims

[817]

[CAPTION] 61 Civ. 2324

Defendant Hughes Tool Company (hereinafter "Toolco") for its answer to the complaint and for its counterclaim herein states:

Answering the First Claim for Relief

1. Toolco denies each and every allegation of paragraphs 7, 9, 10, 22, 23, 24, 26, 36, 37, 38 and 44 through 55 inclusive of the complaint.

2. Toolco admits the allegations contained in paragraphs 2, 6, 25, 29, 30, 32, 33, 34 and 40 of the complaint.

[818] 3. Toolco admits that it is a corporation organized and existing under the laws of the State of Delaware and that it has assets of several hundred million dollars and except as so admitted denies each and every allegation of paragraph 3 of the complaint.

4. Toolco admits that Howard R. Hughes (hereinafter "Hughes") has been its sole stockholder from a time prior to January, 1939 to the present, that from a time prior to January, 1939 to December, 1960, he was an officer of Toolco, and except as so admitted denies each and every allegation of paragraph 4 of the complaint.

5. Toolco admits that Raymond M. Holliday has been for some years past, and now is, an officer of Toolco, that since 1959 he has been, and now is, a director of Trans World Airlines, Inc. (hereinafter "TWA"), and except as so admitted denies each and every allegation of paragraph 5 of the complaint.

6. Toolco admits that TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States, that since 1946 TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia, that during the period from 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of $100,000,000, which aircraft were manufactured by manufacturers in various states in the United States, that in 1960 operating revenues of TWA were substantially in excess of $300,000,000 and net income after taxes in excess of $6,000,000, that in 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, and, except as so admitted, denies that [819] it has knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of the complaint.

7. Toolco admits that commencing in or about the year 1939 and at various times thereafter it acquired common stock of TWA, that as at December 31, 1960, the amount of stock so acquired amounted to approximately 78.2% of such common stock, and except as so admitted denies each and every allegation of paragraph 11 of the complaint.

8. Toolco admits that commencing in 1958 jet-powered aircraft became one of the most important factors in the competitive operations of air carriers, and except as so admitted denies each and every allegation of paragraph 12 of the complaint.

9. Toolco admits that by 1955 aircraft manufacturers (including Boeing Airplane Company (hereinafter "Boeing") and Douglas Aircraft Company, Inc. (hereinafter "Douglas")) had prepared to the general knowledge of the air carrier industry plans and drawings and otherwise had undertaken preparations for the manufacture of jet-powered aircraft intended for use by air carriers, that many air carriers beginning in 1955 devoted substantial efforts to determining what, if any, jet aircraft they should

acquire and to obtaining jet aircraft suitable to their needs, that Boeing and Douglas contemplated and did ultimately manufacture jet-powered aircraft for long range and medium range flights, and except as so admitted denies each and every allegation of paragraph 13 of the complaint.

10. Toolco admits that General Dynamics Corporation, Convair Division (hereinafter "General Dynamics"), on its own account as one of the four major domestic aircraft manufacturers, commenced a program prior to 1955 for the design, development [820] and manufacture of a jet-powered transport aircraft designated the Model 18, that such program never proceeded past the preliminary design stage and was terminated in 1955 by General Dynamics, and except as so admitted denies each and every allegation of paragraph 14 of the complaint.

11. Toolco admits that prior to May 1, 1956, it considered the manufacture of a jet-powered aircraft with design and range characteristics suitable for use on both domestic and transatlantic routes, that Toolco contemplated that if it did manufacture this aircraft it woulld furnish the same to TWA and other air carriers, that it abandoned consideration of manufacture of such an aircraft prior to mid-1956, and except as so admitted denies each and every allegation of paragraph 15 of the complaint.

12. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the complaint.

13. Toolco admits that in January 1956 Toolco entered into an agreement with Boeing for the purchase of eight Model 707-131 jet-powered aircraft with an option to purchase seven additional such aircraft, that in 1956 Toolco exercised its option to purchase such additional aircraft and also placed an order for eighteen long-range Boeing jet transports, and that in June of 1956 Toolco committed for the purchase of thirty Convair 880 aircraft from General

Dynamics, and except as so admitted denies each and every allegation of paragraph 17 of the complaint.

14. Toolco admits that purchase orders placed by Toolco with General Dynamics and Boeing gave Toolco the right to assign to TWA the right to acquire the jet-powered aircraft [821] ordered by Toolco, and that Toolco released six of the long-range Boeing jet transports on order in a transaction with Boeing and Pan American World Airways, Inc. which was recommended and approved by the management of TWA, and except as so admitted denies each and every allegation of paragraph 18 of the complaint.

15. Toolco admits that during the period 1956 to 1960 changes were made in the design and configuration of the Model 880 Convair aircraft ordered by Toolco and except as so admitted denies each and every allegation of paragraph 19 of the complaint.

16. Toolco admits that in the period 1959 and 1960 Toolco leased to TWA certain jet-powered aircraft on a day-to-day basis, that such aircraft were the only jet-powered aircraft flown on TWA's scheduled routes during said years, and except as so admitted denies each and every allegation of paragraph 20 of the complaint.

17. Toolco admits that on or about May 17, 1960, Northeast Airlines, Inc. (hereinafter "Northeast") submitted to TWA a proposed agreement for the merger of Northeast with and into TWA, that Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the east coast of the United States and Canada, that upon information and belief in 1959 Northeast's revenue miles totaled 519,000,000 and its total assets exceeded $35,000,000, and except as so admitted denies each and every allegation of paragraph 21 of the complaint.

18. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27 of the complaint.

[822] 19. Toolco admits that subsequent to 1955 it discussed with various persons various proposals for the financing of jet-powered aircraft and except as so admitted denies each and every allegation of paragraph 28 of the complaint.

20. Toolco admits that as part of the arrangements with certain banks and insurance companies, Toolco, TWA and three Voting Trustees (Ernest R. Breech, Irving S. Olds and Holliday) executed an agreement dated as of December 15, 1960, which provided that the TWA stock owned and to be owned by Toolco would be placed in a voting trust (hereinafter "the Voting Trust"), and except as so admitted denies each and every allegation of paragraph 31 of the complaint.

21. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 35 of the complaint.

22. Toolco admits that on or about May 31, 1961, it sent a telegram to Boeing that set forth certain positions of Toolco and except as so admitted denies each and every allegation of paragraph 39 of the complaint.

23. Toolco admits that TWA requested the Securities and Exchange Commission to accelerate the effective date of its Registration Statement to May 18, 1961, and that Toolco opposed such acceleration by reason of certain deficiencies in said Registration Statement, and except as so admitted denies each and every allegation of paragraph 41 of the complaint.

24. Toolco admits that pursuant to the direction of the Securities and Exchange Commission its counsel set forth in a letter to the Securities and Exchange Commission and TWA a statement as to the respects in which TWA's Registration Statement might be deficient, that in said letter [823] it was stated to be the position of Toolco that it was compelled to enter into the Voting Trust under con-

ditions which would warrant a termination of the Voting Trust otherwise than in accordance with the terms of the arrangements under which it was created, that it was further stated in said letter that Toolco had requested its counsel to investigate the possibility of enjoining the Boeing purchase transaction or of taking action on behalf of TWA against the persons responsible for any commitments incurred or damages suffered by TWA in connection with such program, and except as so admitted denies each and every allegation of paragraph 42 of the complaint.

25. Toolco admits that after TWA's Registration Statement had been twice amended subsequent to the sending of the aforesaid letter, the Securities and Exchange Commission accelerated the effective date of the Registration Statement as so amended so as to make the Registration Statement effective on May 24, 1961, and except as so admitted denies each and every allegation of paragraph 43 of the complaint.

Answering the Second Claim for Relief

26. Toolco denies each and every allegation of paragraphs 56 through 64, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Toolco repeats to the same extent as if herein fully set forth each and every denial or admission which it has made with respect to the paragraphs so realleged.

[824]

Answering the Third Claim for Relief

27. Toolco denies each and every allegation of paragraphs 67 through 70, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Toolco repeats to the same extent as if herein fully set forth each and every denial or admission which it has made with respect to the paragraphs so realleged.

AS A FIRST AND COMPLETE DEFENSE TO THE COMPLAINT AND EACH CLAIM FOR RELIEF ALLEGED THEREIN:

28. The complaint, and each of the claims for relief alleged therein, fail to state a claim upon which relief can be granted.

AS A SECOND AND COMPLETE DEFENSE TO THE COMPLAINT AND EACH CLAIM FOR RELIEF ALLEGED THEREIN:

29. The alleged facts set forth in the complaint do not constitute violations by Toolco of Section 1 of the Sherman Act (15 U. S. C. § 1 (1958)), of Section 2 of the Sherman Act (15 U. S. C. § 2 (1958)), of Section 3 of the Clayton Act (15 U. S. C. § 11 (1958)), or of Section 7 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 18 (1946 Ed.)), and since plaintiff TWA and defendant Toolco are both Delaware corporations, this Court lacks jurisdiction over the subject matter of the action and over each of the claims for relief alleged in the complaint.

[825] AS AND FOR A THIRD AND COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT AND EACH CLAIM FOR RELIEF ALLEGED THEREIN:

30. Since both Toolco and TWA are Delaware corporations, the jurisdiction of this Court, if any, depends upon the alleged violations of the antitrust laws contained in plaintiff TWA's complaint.

31. Toolco is a corporation primarily engaged in the manufacture and sale of equipment for the oil well drilling industry. It has at no time manufactured commercial transports and its sole activities with respect to the sale or lease of aircraft to commercial airlines (except for the sale of two DC-6 aircraft originally acquired by Toolco for its own use) have arisen from its efforts to assist TWA in obtaining flight equipment adequate to its needs. It has at no time been in the business of selling or leasing any flight equipment to any airline and the only occasions on which

it has made equipment ordered by it available to any airline other than TWA have been when certain equipment ordered for the use and benefit of TWA has proved to be in excess of the needs or capabilities of TWA.

32. Toolco first acquired an interest in TWA in 1939 when the airline industry was in its infancy. By the end of 1942 it had acquired approximately 45% of the total outstanding shares of TWA. Thereafter, it acquired additional shares of TWA until it had acquired more than 78% of said shares.

33. The control of TWA by Toolco and the acquisition of more than 78% of the common stock of TWA by Toolco were subject to and approved by orders of the Civil Aeronautics Board (hereinafter "the Board") under Section 408 of the [826] Federal Aviation Act of 1958 (49 U. S. C. § 1378) or the identical provisions of Section 408 of the Civil Aeronautics Act of 1938. Section 414 of the Federal Aviation Act of 1958 (49 U. S. C. § 1384) exempts and relieves any person affected by any such order from the operation of the antitrust laws and of all other restraints or prohibitions made by or imposed under authority of law in so far as may be necessary to enable such person to do anything authorized, approved or required by such order.

34. The initial acquisition of a controlling interest in TWA by Toolco was approved by the Board, under Section 408 of the Civil Aeronautics Act of 1938, as consistent with the public interest, in an opinion and order dated October 17, 1944. Said order provided that such approval would be effective so long as commercial transactions between TWA and Toolco were limited to those involving complete items of property the price of which did not exceed $200 each, with the further limitation that the total annual expenditures involved in such commercial transactions by either party should not exceed $10,000.

35. In 1950 the Board approved under said Section 408 the further acquisition of control of TWA by Toolco sub-

ject to the same conditions contained in the aforesaid 1944 order. In so doing, the Board approved the exercise by Toolco of complete control over the business and affairs of TWA, including equipment and financing, and found that the continuing interest of Toolco in TWA appeared essential to the best interest of the carrier and the public.

36. Since the date of the Board's 1944 order no commercial transactions between Toolco and TWA have taken [827] place except as authorized by said order or except after a modification of said order upon a finding by the Board under said Section 408 that the proposed transaction was consistent with the public interest.

37. Toolco from the time of its initial acquisition of an interest in TWA has on various occasions assisted TWA in acquiring flight equipment adequate to its needs and in financing such flight equipment. TWA also acquired flight equipment directly from various manufacturers without assistance from Toolco. Orders of the Board specifically approved as not inconsistent with the public interest all transactions between TWA and Toolco with respect to the acquisition or financing of flight equipment.

38. The complaint does not allege any violation of the Federal Aviation Act of 1958 or of the orders of the Board under Section 408 thereof.

39. The only act alleged in the complaint with respect to the period prior to 1961 which was not specifically approved by the Board was a proposal that Northeast be merged with and into TWA. Such a merger proposal was, however, within the contemplation of the Board in approving control of TWA by Toolco. The merger proposal was, moreover, specifically conditioned upon the approval of the Board under the applicable provisions of the Federal Aviation Act of 1958, including Section 408 thereof, and upon approval by a majority of the stockholders of TWA other than Toolco voting at a meeting called to approve such a merger.

40. In December, 1960, as a result of the demands and unlawful activities of certain lending institutions and others, Toolco was compelled to place in a voting trust the [828] shares of common stock of TWA which it owned. By reason of such voting trust Toolco no longer controls TWA. All of the activities of Toolco alleged in the complaint with respect to the period subsequent to 1960 were taken on the advice of counsel for Toolco solely for the purpose of protecting Toolco's interests as beneficiary under said voting trust and as equitable owner of more than 78% of the stock of TWA.

41. By reason of the facts herein alleged, this Court lacks jurisdiction of the subject matter of the complaint and over the subject matter of each alleged claim for relief contained therein.

AS AND FOR A FIRST COUNTERCLAIM AGAINST TWA AND AGAINST ADDITIONAL DEFENDANTS THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, DILLON, READ & CO. INC., ERNEST R. BREECH AND CHARLES C. TILLINGHAST, JR.

42. Toolco is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Houston, Texas. All of its common stock is owned by Hughes, a leading aviator and aeronautical engineer who for many years has been interested in the development of commercial aviation in the United States.

43. Plaintiff TWA is a corporation organized and existing under the laws of the State of Delaware with its principal executive offices in the City of New York. TWA is and for many years has been the country's third largest domestic and second largest international air carrier. At all times hereinafter mentioned from 1947 to December, 1960, Toolco owned a majority of TWA's capital stock and nominated [829] a majority of TWA's directors. Since De-

cember, 1960 Toolco has been the equitable owner of in excess of 78% of the captial stock of TWA which stock was placed in a voting trust in December, 1960.

44. Additional defendants The Equitable Life Assurance Society of the United States (hereinafter "Equitable") and Metropolitan Life Insurance Company (hereinafter "Metropolitan") are corporations organized and existing under the laws of the State of New York with their principal places of business in the City of New York. Metropolitan is the country's largest insurance company with admitted assets of approximately $17 billion. Equitable is the country's third largest insurance company with admitted assets of approximately $10 billion. From 1947 to December, 1960 Equitable was the sole holder of TWA's senior indebtedness other than bank debt. At all times since December, 1960 Equitable and Metropolitan have been the holders of all such senior indebtedness of TWA.

45. Additional defendant Irving Trust Company (hereinafter "Irving") is a trust company organized and existing under the banking laws of the State of New York with its principal place of business in the City of New York. Irving is and for many years has been one of TWA's principal commercial bankers, has made loans and participated with other lending institutions in making loans to TWA and has undertaken on behalf of TWA to bring together lending institutions for the purpose of participating in loans to TWA. Irving for many years prior to 1961 maintained a similar banking relationship with Toolco.

46. Additional defendant Ernest R. Breech (hereinafter "Breech") is, upon information and belief, a citizen of [830] the State of Michigan. From December, 1960, until his resignation on or about January 26, 1962, he was one of the two voting trustees selected by Equitable and Metropolitan with respect to 5,221,301 shares of TWA's capital stock owned by Toolco which were placed in a voting trust in December 1960. Breech is and at all times since April

27, 1961 has been the Chairman of the Board of Directors of TWA.

47. Additional defendant Charles C. Tillinghast, Jr. (hereinafter "Tillinghast"), a citizen of the State of New York, is and at all times hereinafter mentioned since April 17, 1961, has been the president and chief executive officer of TWA.

48. Additional defendant Dillon, Read & Co. Inc. (hereinafter "Dillon Read"), on information and belief, is a corporation organized and existing under the laws of the State of New York with its principal place of business in the City of New York. Dillon Read is engaged in the investment banking business and is and since early 1959 has been the principal financial adviser to TWA.

49. This counterclaim is asserted pursuant to Rule 13(a) of the Federal Rules of Civil Procedure and arises out of the subject matter of TWA's claims herein.

50. In 1960 Equitable and Metropolitan, together with a group of commercial banks headed by Irving, demanded as a condition to their providing any financing to TWA that Toolco place in a lender-controlled voting trust prior to any default all shares of TWA stock which it owned. Such financing was required by TWA in order for it to acquire jet aircraft theretofore ordered by Toolco for the benefit of TWA. In order to insure that such needed jet equipment [831] would be acquired by TWA and for reasons which included the difficulty, if not impossibility, of obtaining such financing elsewhere, Toolco was compelled to yield to such demands but only upon the express agreement and understanding that:

(a) The Voting Trust would terminate upon the repayment of the obligations in connection with which it was created; and

(b) Toolco would have the right to terminate the Voting Trust by purchasing all such obligations at

the principal amount thereof together with accrued interest and, in addition, by paying to Metropolitan and Equitable a premium to be initially 22% of the principal amount of such obligations acquired by them.

51. Thereafter, in December 1960, pursuant to the aforesaid agreement Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions for the financing of the acquisition of the jet flight equipment ordered by Toolco for the benefit of TWA. In connection therewith and the purchase by Equitable and Metropolitan of $92,800,000 principal amount of TWA's 6½% Equipment Mortgage Sinking Fund Notes due December 31, 1972 (hereinafter the "Series A Sinking Fund Notes") and the borrowing by TWA of $72,800,000 from banks headed by Irving, which borrowing was evidenced by 6% Equipment Mortgage Serial Notes due December 31, 1961—December 31, 1964 (hereinafter the "Series A Serial Notes"), Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions and agreements by which the 5,221,301 shares of TWA's common stock were placed in the Voting Trust and Metropolitan and Equitable designated Breech and Irving S. Olds as two of the three voting trustees with [832] respect to said stock. By the terms of said agreements:

(a) Metropolitan and Equitable, as the holders of a majority in principal amount of the Series A Sinking Fund Notes and Series A Serial Notes, acting through Irving as agent for the lenders, have, and at all times since December, 1960, have had, the absolute right and power to remove the two lender-named voting trustees, or either of them, and to designate and remove from time to time the successor of either of said voting trustees.

(b) The Voting Trust is to continue, as to all shares of TWA beneficially owned by Toolco, for a period of 10 years from its inception, unless sooner

terminated in accordance with the terms of said agreements; and Toolco covenanted, so long as it should be the owner of any voting trust certificates, further to extend the Voting Trust, at the request of Irving as agent, for such additional period not exceeding the maximum period then permitted by the law of Delaware as should be specified in such request.

(c) The Voting Trust shall terminate (i) upon consent of Irving as agent acting at the direction of the holders of a majority in amount of the Series A Serial Notes and Series A Sinking Fund Notes, or (ii) upon cancellation and discharge of the Indenture of Mortgage securing said Notes, i.e., upon the payment or prepayment of said Notes, or (iii) upon the exercise by Toolco of an option to purchase, after December 31, 1961, all but not less than all of the Series A Sinking Fund Notes and Series A Serial Notes at a price equal to the [833] principal amount thereof plus accrued interest and, in addition thereto, a premium which is initially 22% of the principal amount of the Series A Sinking Fund Notes, namely, $20,416,000.

52. By reason of the agreements and transactions entered into in December, 1960, and the Voting Trust then created, Equitable and Metropolitan, together with other lending institutions including Irving, acquired and now possess control over the business and affairs of TWA. They have the right and power at any time to remove and select a successor to either or both of the voting trustees whom they have chosen. The majority voting trustees who are thus subject to their control in turn have the absolute right and power under the by-laws of TWA at any time to reconstitute TWA's Board of Directors without cause by altering the number of directors, by removing the entire Board of Directors at will, and subject to certain qualifications, by removing one or more directors. The majority voting trustees have used the power so given to them to

reconstitute TWA's Board of Directors and the members of said Board of Directors as presently constituted have been chosen in accordance with the wishes and with the approval of Metropolitan and Equitable.

53. Since the creation of the Voting Trust and the reconstitution of TWA's Board of Directors, TWA, Breech, Tillinghast, Irving, Metropolitan, Equitable and Dillon Read entered upon a course of conduct designed and calculated to prevent Toolco from regaining control of TWA, to perpetuate the Voting Trust and to interfere with the right of Toolco to terminate the Voting Trust in accordance with the rights of Toolco to terminate the Voting Trust in accordance with the terms of the agreements made in December 1960. Among the actions taken in furtherance of these objectives were the following:

[834] (a) In or about March, 1961, Breech selected Tillinghast to be TWA's president and chief executive officer. Prior to his selection Tillinghast had had no experience in the airline industry but he had acted as counsel for a corporation of which Breech was the chief executive officer. Upon information and belief, prior to his acceptance of the presidency of TWA, Tillinghast consulted with Breech and thereafter with representatives of Equitable, Metropolitan and Irving as to steps which could be taken to make it impossible for Toolco to terminate the Voting Trust and regain control of TWA in the foreseeable future and Dillon Read participated in conversations and suggestions as to how Tillinghast could be satisfied that Toolco would be unable to terminate the Voting Trust.

(b) Thereafter, TWA entered into an employment contract with Tillinghast pursuant to recommendations made by Breech. This contract provides that Tillinghast will be employed as TWA's chief executive officer for a minimum of five years upon terms such that upon his retirement or discharge at any time following the termination of the

Voting Trust (or upon his retirement at any other time after five years) he shall receive a pension for ten years, said pension being in the amount of $50,000 per year until he reaches age 65 and $30,000 per year thereafter. Tillinghast is now 50.

(c) Shortly after Tillinghast's election as president, TWA entered into agreements with Boeing for the purchase of additional jet aircraft from Boeing although, upon information and belief, the number of [835] such aircraft which TWA agreed to acquire is in excess of TWA's needs and financial capabilities. The aggregate cost of such jet aircraft and related equipment is in excess of $187,500,000. In order to finance such purchases, TWA through Dillon Read proposed to enter into agreements with Metropolitan, Equitable and the banking group headed by Irving to supply an additional $147,000,000 of senior debt. Metropolitan, Equitable and Irving agreed to supply such financing only upon terms designed and calculated to perpetuate the Voting Trust and to preclude Toolco from regaining control of TWA in accordance with the agreements made in December, 1960.

(d) In May 1961, Toolco learned of such proposed action between TWA and the lending institutions which control TWA. Toolco notified TWA, the voting trustees and the lending institutions of its concern at the self-dealing implicit in such negotiations. Toolco requested that it be informed as to the details of the contemplated financing of the Boeing purchases. TWA refused to furnish such information to it.

(e) Thereafter, in August 1961, TWA, upon information and belief, entered into agreements with Metropolitan and Equitable and with Irving and its associated banks, by the terms of which:

(i) TWA agreed to sell and Equitable and Metropolitan agreed to purchase, subject to cer-

tain conditions, an aggregate of $107,000,000 principal amount of additional sinking fund notes bearing interest at 6% and maturing on December 1, 1977 (hereinafter the "Series B Sinking Fund Notes");

(ii) Irving and the banking group which it [836] headed agreed to lend to TWA, subject to certain conditions, an additional $40,000,000 to be evidenced by additional serial notes bearing interest at 5½% and maturing serially from December 31, 1963 through December 31, 1966 (hereinafter the Series B Serial Notes);

(iii) As required by its agreements with Metropolitan, with Equitable and with Irving and its associated banks, TWA entered into a supplemental indenture by the terms of which the holders of a majority in principal amount of the Series B Sinking Fund Notes and Series B Serial Notes, namely, Metropolitan and Equitable, may demand payment from TWA of the principal of all said Notes ($147,000,000) together with accrued interest upon the happening of any of the following events, whether or not such events have come about or been effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body:

(a) the Voting Trust agreement shall have terminated for any reason whatsoever other than a termination by Irving as agent, prior to the payment in full of all the outstanding Series A Sinking Fund Notes and Series A Serial Notes at the voluntary request of the holders (other than Toolco or a Toolco affiliate) of a majority in amount of such outstanding Notes;

[837] (b) the rights of the holders (other than Toolco or affiliates of Toolco) of a majority of the outstanding Series A Sinking Fund Notes and Series A Serial Notes, acting through Irving as agent, to remove and fill vacancies in the office of the two voting trustees appointed by Irving as agent shall have terminated for any reason whatsoever other than a termination by the voluntary action of such holders of a majority of the Series A Sinking Fund Notes and Series A Serial Notes; or

(c) all the outstanding Series A Sinking Fund Notes and Series A Serial Notes shall be owned by Toolco or by any affiliate of Toolco, or by Toolco and any affiliate of Toolco.

Neither TWA nor any of the lending institutions sought or obtained the consent of Toolco to such agreements.

54. The employment contract between Tillinghast and TWA in so far as it requires TWA to pay to Tillinghast an annuity upon the termination of the Voting Trust whether or not in accordance with its terms is without consideration and represents a waste of the corporate assets of TWA.

55. The supplemental indenture into which TWA entered in August 1961, in so far as it permits the accelerations of the maturity of the Series B Sinking Fund Notes and the Series B Serial Notes constituted and constitutes unjustified self-dealing between TWA and those now in control of TWA, was and is contrary to and in violation of the agreements or obligations of TWA, Metropolitan, Equitable and Irving made or incurred at and prior [838] to the time the Voting Trust was created and constituted and constitutes an unjustifiable interference with the rights of Toolco to effect the termination of the Voting Trust in

accordance with said agreements. In connection with TWA's 1961 financing Dillon Read, upon information and belief, received substantial payments, the exact amount of which is presently unknown to Toolco.

56. Upon information and belief, TWA, Breech, Tillinghast, Metropolitan, Equitable and Dillon Read will, unless enjoined by this Court, continue to engage in a course of conduct designed and calculated to perpetuate the Voting Trust, to prevent its termination in accordance with its terms and to perpetuate the control of Metropolitan and Equitable and of Breech and Tillinghast over the business and affairs of TWA.

57. Additional defendants Breech, Tillinghast, Metropolitan, Equitable, Irving and Dillon Read are necessary parties in order that complete relief may be granted to Toolco.

58. By reason of the foregoing Toolco has suffered substantial damages and is threatened with irreparable injury.

59. Toolco has no adequate remedy at law.

AS AND FOR A SECOND COUNTERCLAIM AGAINST TWA AND AGAINST ADDITIONAL DEFENDANTS METROPOLITAN, EQUITABLE AND IRVING

60. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, and 50 through 56, inclusive, hereof.

61. Jurisdiction of this Court arises from the violations of Section 408 of the Federal Aviation Act of 1958 (49 U. S. C. § 1378) herein alleged. Said Section 408 makes it unlawful for any person engaged in any phase of aeronautics to [839] acquire control of any air carrier in any manner whatsoever unless such acquisition of control is approved by the Board and further makes it unlawful for any such

person to continue to maintain control of any air carrier which has been acquired in violation of said Section 408.

62. At all times since 1955 Metropolitan and Equitable have been and are now persons engaged in a phase of aeronautics within the meaning of said Section 408 by reason of activities which include the following:

(a) Upon information and belief, at all times since 1955 the major airlines of the United States have been and are now dependent upon Equitable, Metropolitan and Prudential Life Insurance Company of America (hereinafter "Prudential"), the country's second largest insurance company, for long-term senior financing and said insurance companies have dominated, and now dominate, the supplying of such financing to the major air carriers of the United States. This dominance has arisen in part from the historic interest of said insurance companies in airline financing, in part from the recognition and enforcement of the traditional lender concept and in part from the vast amounts of financing required by the major airlines, particularly in connection with the acquisition of jet flight equipment. Upon information and belief, since 1955 none of the country's five largest air carriers have arranged any senior financing other than bank financing without the participation therein of one or more of said three insurance companies.

(b) Metropolitan is, and, upon information and belief, for many years has been, the country's largest supplier of financing to air carriers. As at December [840] 31, 1960 it held obligations of said carriers in a principal amount in excess of $288 million. Included in such obligations were those of four of the country's five largest air carriers, including TWA.

(c) Equitable is, and, upon information and belief, for many years has been, the country's third largest supplier of financing to air carriers. As at

December 31, 1960 it held obligations of said carriers in a principal amount in excess of $188 million, including obligations of TWA.

(d) As at December 31, 1960, Metropolitan held senior obligations of air carriers other than TWA in a principal amount in excess of $250 million and Equitable held such obligations in a principal amount in excess of $144 million.

(e) As at December 31, 1960, Metropolitan held in excess of 46% and Equitable in excess of 28% of the senior long-term debt of the country's five largest air carriers.

63. In December 1960 by the creation of the Voting Trust and the agreements made in connection therewith, Metropolitan and Equitable acquired control of TWA within the meaning of Section 408 of the Federal Aviation Act of 1958. Neither Equitable nor Metropolitan sought or obtained the approval of the Board pursuant to said Section 408 to such acquisition of control of an air carrier and Metropolitan and Equitable have continued to maintain and perpetuate their control of TWA without Board approval.

64. As more fully alleged in paragraph 53 hereof, in August 1961 Metropolitan and Equitable, together with Irving and its associated banks, agreed with TWA to supply [841] to TWA an additional $147 million of senior financing upon terms and conditions calculated to perpetuate the Voting Trust and the control of Equitable and Metropolitan over the business and affairs of TWA. No approval of the Board was sought or obtained to this further consolidation of control by Metropolitan and Equitable.

65. By reason of the facts herein alleged, the acquisition and maintenance of control of TWA by Metropolitan and Equitable through the Voting Trust and the consolidation of that control by giving to Metropolitan and Equitable the power to accelerate indebtedness of TWA upon termi-

nation of the Voting Trust was and is unlawful under Section 408 of the Federal Aviation Act of 1958 and the creation and continued existence of the Voting Trust was and is contrary to the public policy of the United States.

66. TWA, Equitable, Metropolitan and Irving are necessary parties to this second counterclaim in order that Toolco may be afforded full and proper relief hereunder.

67. Toolco has no adequate remedy at law.

AS AND FOR A THIRD COUNTERCLAIM AGAINST TWA AND AGAINST ALL ADDITIONAL DEFENDANTS

68. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 50 through 55, inclusive, and 62 hereof.

69. Upon information and belief, additional defendants James F. Oates, Jr. (hereinafter "Oates") and Harry C. Hagerty (hereinafter "Hagerty") are citizens of the State of New York; Oates is, and at all times hereinafter mentioned since 1955 has been, the president of Equitable and is and has been since said date in a position to determine or influence [842] its lending policies; Hagerty at all times hereinafter mentioned since 1955 until December 31, 1961 was the Vice Chairman of the Board of Directors of Metropolitan and was during such period in a position to determine or influence its lending policies.

70. Additional defendant Ben-Fleming Sessel (hereinafter "Sessel") is a citizen of the State of Connecticut. He is, and at all times hereinafter mentioned since 1955, has been the Senior Vice President of Irving and a director of TWA. He was originally nominated as a director of TWA by Toolco.

71. Toolco asserts this counterclaim derivatively in the right of TWA and its stockholders. It has made no demand upon the directors or the stockholders of TWA to bring this

claim for the reasons that the directors are under the domination and control of the additional defendants, that more than 78.2% of the stock of TWA is held in the Voting Trust, that a majority of the voting trustees of such stock are subject to the control of the additional defendants and that demand would be futile.

72. Jurisdiction of this Court over this counterclaim arises from the violations by the additional defendants of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2) and of Section 7 of the Clayton Act (15 U. S. C. § 18) hereinafter alleged.

73. The trade or commerce among the several States which is the subject matter of this counterclaim includes:

(a) The furnishing in interstate commerce by lending institutions of senior financing to the major airlines of the United States; and

(b) The furnishing in interstate commerce by [843] lending institutions of senior long-term financing to the major airlines of the United States.

74. The requirements of the major airlines for senior financing constitute and have constituted a separate and distinct market for lending institutions for reasons which include the following:

(a) The large amounts of moneys required;

(b) The large amounts of moneys required at a particular time; and

(c) The nature of the security for such financings, namely, jet and other aircraft which have a limited useful life and which may become obsolete in a relatively few years.

75. The requirements of the major airlines for long-term senior financing constitute and have constituted a separate and distinct market from the total requirements of the major airlines for senior financing for the reason that

banking institutions which have furnished a substantial portion of the senior short-term financing do not act as suppliers of long-term financing. As used herein, the term "long-term financing" means debt financing maturing more than five years from its creation and the term "short-term financing" means debt financing maturing within five years of its creation.

76. TWA constitutes and has constituted a substantial proportion of the market for the supplying of long-term and short-term financing to the major airlines of the United [844] States. For example, in 1960 Equitable and Metropolitan supplied to TWA $92.8 million in long-term financing and Irving and a banking group which it headed supplied $72.2 million in short-term financing and in 1961 TWA agreed to sell to Metropolitan and Equitable, and Metropolitan and Equitable agreed to purchase, an additional $107 million of long-term debt securities and Irving and, with one exception, the same banking group agreed to lend on a short-term basis an additional $40 million.

77. The violations of the antitrust laws hereinafter more fully alleged include the following:

(a) A combination and conspiracy to restrain interstate commerce by preventing TWA from acquiring (i) senior long-term financing from others than Equitable and Metropolitan except with the consent and acquiescence of Equitable and Metropolitan and (ii) senior short-term financing from others than Irving and such banking institutions as it permitted to participate in such financing, all in violation of Section 1 of the Sherman Act.

(b) A combination and conspiracy to attempt to monopolize and to monopolize a substantial segment of the interstate trade and commerce of the United States by attempting to monopolize and monopolizing the supplying of senior long-term financing to the major airlines of the United States, all in violation of Section 2 of the Sherman Act.

(c) An agreement in restraint of interstate trade and commerce of the United States, to refuse to supply financing to TWA or Toolco so long as TWA was, is or [845] shall be controlled by Toolco, all in violation of Section 1 of the Sherman Act.

(d) A combination and conspiracy to restrain interstate commerce by preventing TWA from obtaining long-term or short-term senior financing except at interest rates fixed in advance by agreement among lending institutions, all in violation of Section 1 of the Sherman Act.

(e) An agreement in restraint of interstate trade and commerce of the United States between and among lending institutions, including Equitable and Metropolitan and others, to the effect that (i) none of such lenders would supply financing to any major airline without the consent of the traditional senior lender to that airline, and (ii) in the event that the traditional senior lender to an airline refused to supply financing except upon particular terms, none of the other of such lenders would supply financing to that airline upon any terms, all in violation of Section 1 of the Sherman Act.

(f) The acquisition by Equitable, Metropolitan and other lending institutions, through voting trustees, of legal title to more than 78.2% of the capital stock of TWA, in violation of Section 7 of the Clayton Act.

(g) The refusal of Irving and the refusal of other lending institutions, whether acting alone or in concert, to extend credit to Toolco or Hughes except upon condition that Hughes as sole stockholder of Toolco, and Toolco as controlling stockholder of TWA, agree to grant to such lending institutions an exclusive market for [846] senior financing through the placing of Toolco's TWA stock in a lender-controlled voting trust, all in violation of Section 1 of the Sherman Act.

78. During the period from 1939 through 1955, Toolco through the use of its credit and resources, from time to time assisted TWA in the acquisition of piston-engined aircraft which TWA did not have the financial resources to acquire but which were necessary to enable TWA to maintain its competitive position on its authorized routes and to expand its operations pursuant to new authorizations of additional routes. In 1955 TWA and Toolco recognized that in order for TWA to maintain its competitive position it would require a fleet of jet-powered aircraft substantially as soon as its principal competitors and that orders for such equipment should not be delayed. TWA did not and would not have the financial resources or credit to order any jet aircraft prior to the end of 1958 at the earliest. Toolco, therefore, in 1956, in accordance with practices previously followed when the acquisition of needed aircraft was beyond TWA's then capabilities, used its own credit and resources to place orders for the acquisition of a fleet of jet aircraft from Boeing and General Dynamics for use by TWA. Prior to the execution of these contracts the type of equipment, the form of the contracts and the specifications of the aircraft were approved in detail by the operating and engineering personnel of TWA; and thereafter TWA's representatives supervised their manufacture, testing and delivery.

79. Toolco's total commitments in connection with TWA's jet equipment program exceeded $300 million. Toolco and TWA recognized that even if Toolco had desired to do so, [847] it could not supply permanent financing for such a fleet. By reason of the vast amount of financing required, such permanent financing could be accomplished only with the participation of one or more principal suppliers of long-term financing to the major airlines, namely Equitable, Metropolitan and Prudential.

80. By 1956 Equitable had established itself as TWA's traditional senior lender, holding $40 million in principal amount of TWA's 3¾% Equipment Mortgage Sinking Fund Bonds (hereinafter "the Sinking Fund Bonds")

due December 1, 1969. Upon information and belief, prior to 1956, lending institutions, including Metropolitan, Equitable and Prudential, entered into an understanding and agreement that (i) none of such lending institutions would supply financing to an airline except with the consent of the traditional senior lender to that airline and (ii) if the traditional senior lender to an airline refused to supply such financing except upon particular terms, none of such lending institutions would supply financing on any terms. By reason of such agreement and understanding, Equitable's position as traditional senior lender to TWA made Equitable's support a necessity if the permanent financing of TWA's jet equipment program were to be accomplished.

81. Toolco discussed with Equitable in 1958 Equitable's requirements as to the permanent financing of TWA's jet equipment program. In such discussions Equitable indicated that:

(a) Since in Equitable's view, TWA's financial condition had not improved sufficiently so that TWA could independently finance the required jet fleet, Toolco would either have to supply a substantial [848] portion of such financing itself or be responsible for the obligations incurred by TWA;

(b) Equitable would require that as a condition to its participation in any TWA financing Toolco agree that Toolco's stock interest in TWA would be placed in a lender-controlled voting trust but only in the event of a default by TWA; and

(c) As a part of any financing TWA's Sinking Fund Bonds which Equitable held would have to be refunded.

82. The discussions with Equitable during 1958 were unsatisfactory to Toolco, primarily because Equitable did not appear prepared to participate in financing TWA's jet program unless Toolco assumed substantial permanent

obligations. In early 1959 Dillon Read was retained to prepare plans for the permanent financing of TWA's jet equipment program. Dillon Read advised Toolco and TWA that since Equitable was TWA's traditional senior lender, Equitable's support and participation was essential to the development of any permanent financing. Dillon Read further advised Toolco and TWA that under prevailing conditions an offering of equity securities by TWA would be inadvisable.

83. In view of the apparent difficulties to independent financing by TWA, Toolco, in cooperation with TWA, developed a plan for permanent financing through a leasing arrangement. Dillon Read undertook to and did develop a proposal for such an arrangement on terms which they presented as advantageous to TWA. TWA did not accept this proposal since Equitable would not support such a leasing plan.

84. Toolco had reason to believe that the public [849] acceptance of jet aircraft and the consequent improvement in the earnings of TWA would place TWA in a position independently to finance its jet equipment program. Early in 1959 Boeing commenced the delivery of jet aircraft ordered by Toolco. As such aircraft were received, they were placed in service by TWA under temporary leases pending permanent financing by TWA. TWA was thus enabled to place jet aircraft in transcontinental service substantially at the same time as one of its principal domestic competitors and considerably in advance of its other principal domestic competitor. After this early introduction of jet equipment TWA realized earnings before taxes in excess of $17.4 million in 1959 and in excess of $15.2 million in 1960.

85. Toolco financed the acquisition of jet aircraft leased to TWA out of its own cash resources until they were all but exhausted. Thereafter, such jet aircraft were financed largely through loans from Irving, TWA's and Toolco's lead bank, and other banks. Such loans were made avail-

able to Toolco until early in 1960. Although Irving informed Toolco in 1959 that it had exhausted its legal loan limit, its consents to subsequent loans continued to be required by reason of the terms of its existing loans. In 1959 Toolco advised Irving that such interim credit should not be terminated without giving Toolco adequate lead time either to arrange other interim credit or to consummate a plan for the permanent financing of TWA.

86. Upon information and belief, at some time in or about March 1960, the exact time being unknown to Toolco, Equitable, Irving and other lending institutions, Dillon Read and Oates, Sessel and others entered into an understanding and conspiracy (the persons who either at its inception or from [850] time to time thereafter joined such conspiracy being hereinafter called "the conspirators") to the following effect:

(a) Equitable and Irving would use their respective positions as traditional senior lender and lead bank to TWA and the conspirators would use all economic and other power at their disposal to obtain and maintain control of TWA for their mutual advantage, including the use of TWA as a market for the supplying of senior financing upon terms advantageous to the lenders.

(b) The conspirators would permit to participate in supplying senior financing to TWA only those whom they selected and would use their concerted efforts to prevent other lending institutions from participating in any TWA senior financing except with the consent of Equitable as to long-term senior financing and of Irving as to short-term senior financing and then only on terms satisfactory to Equitable and Irving.

(c) The conspirators would agree among themselves as to the interest rate to be paid by TWA for senior short-term and long-term indebtedness and would refuse to advance any financing to TWA ex-

cept after its acceptance of such predetermined interest rates.

In furtherance of said conspiracy and pursuant to said understanding the conspirators took the actions hereinafter set forth.

87. Following the refusal of Equitable to support a leasing plan, Toolco with the knowledge and assistance of TWA entered into negotiations with aircraft manufacturers for assistance in the financing of not only TWA's then planned [851] jet fleet but also of additions thereto. Irving learned of such negotiations early in 1960. Thereafter, Irving and other banks which had advanced money to Toolco, without prior notice to Toolco, advised Toolco on March 5, 1960 that they would no longer supply any short-term credit for the purpose of paying for further deliveries of jet equipment for TWA. The payment of rentals due from TWA to Toolco under the leases of jet aircraft by Toolco to TWA would have provided at least a partial alternative source of moneys to Toolco to be used in making payments for jets thereafter to be delivered. Equitable refused to permit TWA to make any such payments.

88. In March 1960, TWA and Toolco agreed to support a plan, later known as the "Dillon Read Plan", which contemplated that Equitable and one or more other insurance companies would supply permanent senior long-term financing, Irving and associated banks would supply short-term and interim senior financing to TWA and Toolco would accept $100 million of subordinated debt of TWA in payment, *pro tanto*, of TWA's obligations to Toolco and also establish a revolving credit in favor of TWA in the amount of $50 million. Equitable agreed to participate in such financing but only on condition that Toolco and TWA agree:

(a) To the acceleration of the maturity of $31,000,000 principal amount of TWA's Sinking Fund Bonds due in 1969 held by Equitable so that

such bonds would mature at the same time as the interim bank debt and to an increase in the interest rate on the Sinking Fund Bonds to that on the interim bank debt;

(b) To a guarantee by Toolco of the payment of said Bonds;

[852] (c) To the interest rate for the permanent financing supplied by the insurance companies being one-half of 1% greater than for the bank financing; and

(d) To the execution of an agreement which would provide that in the event of certain defaults, including a default as a result of a change of management, the TWA stock owned by Toolco would be placed in a voting trust controlled by the lenders.

Dillon Read advised Toolco that no alternative to the acceptance of the Dillon Read Plan and the requirements of Equitable appeared feasible. Relying upon this advice Toolco on or about March 28, 1960, agreed to accept said Plan and requirements.

89. Thereupon Irving on behalf of TWA undertook to form a banking group for the purpose of providing interim and short-term financing to TWA. Prior to Toolco's acceptance of the Dillon Read Plan, Dillon Read had advised Toolco and TWA that the interest rate on the permanent bank financing would be in the neighborhood of five or five and one-half per cent. Sessel, on behalf of Irving, advised TWA and Toolco that negotiations as to interest rate would have to await the formation by it of a banking group and represented to Toolco and to TWA that when a banking group was formed, Toolco and TWA would have a full opportunity to negotiate the interest rate. Thereafter, Metropolitan, after consultation with Equitable and with Equitable's approval, agreed to supply the portion of the long-term financing not being supplied by Equitable, and Metropolitan and Equitable agreed among themselves that the interest rate on such financing would be 6½%. Upon

information and belief, this interest rate was in excess of that on any other financing theretofore or thereafter supplied by Equitable to any other [853] corporation in 1961. When Irving formed its banking group, the members thereof, upon information and belief, after consultation with Equitable and Metropolitan, agreed among themselves and with Metropolitan and Equitable that the interest on the short-term financing would be 6%. Thereafter, Irving refused to negotiate or to permit Toolco or TWA to negotiate the rate of interest with the banking group which it had formed. Upon information and belief, Irving and Dillon Read in violation of their respective fiduciary obligations to TWA each concealed from TWA and Toolco that other commercial banks were interested in participating in such bank financing upon other and more favorable terms to TWA. By reason of such concealment and since no acceptable alternative to the Dillon Read Plan appeared feasible, TWA was compelled to accept the 6% interest rate on the bank financing and the 6½% rate on the insurance company financing.

90. In May 1961, Equitable and Metropolitan and Irving and its associated banks committed themselves to the Dillon Read Plan but under conditions which permitted them to withdraw their commitment in the event of a change in TWA's management. Prior to the making of this commitment Charles S. Thomas (hereinafter "Thomas"), TWA's then president, upon information and belief, had advised Dillon Read and other of the conspirators that he would remain as president of TWA only if he were given a substantial increase in salary and a lifetime retirement annuity. Although the conspirators, prior to committing themselves to the Dillon Read Plan, thus knew of Thomas's plans and the resulting uncertainty as to his tenure, neither Dillon Read nor any of the conspirators informed Toolco or TWA thereof until after Toolco without knowledge of Thomas's planned demands (i) had committed itself to the Dillon Read [854] Plan; (ii) had guaranteed interim loans to be made to TWA up to $40 million pursuant to an agreement between TWA and Irving and its associated

banks, said loans to be used by TWA for the jet equipment program and to repay existing bank loans; and (iii) had guaranteed the Sinking Fund Bonds of TWA held by Equitable, the maturity of which was accelerated to the same date as that of the interim bank financing. The maturity of such interim debt was fixed as the initial closing date under the Dillon Read Plan. The closing was originally scheduled for May 31, 1960 but was postponed to June 23, 1960 and thereafter, at the request of Equitable, to July 23, 1960.

91. On information and belief, prior to July 23, 1960, the precise date being unknown to Toolco, Metropolitan and Hagerty joined the conspiracy hereinabove alleged and, to insure the success thereof, the conspirators entered into a further agreement and understanding to the following effect:

(a) The conspirators, and each of them, would refuse to lend moneys to TWA or Toolco so long as Toolco controlled TWA;

(b) The conspirators, and each of them, would refuse to finance or otherwise deal with TWA or Toolco or Hughes except upon condition that Toolco place its stock in TWA in a lender-controlled voting trust;

(c) The conspirators would use their concerted efforts to obtain and maintain control of TWA and to foreclose all other lenders from the opportunity of supplying financing to TWA except with their consent.

92. Prior to July 23, 1960, but after Toolco was firmly committed to the Dillon Read Plan, after it had guaranteed $54,500,000 principal amount of TWA's indebtedness and [855] after loan agreements had been executed permitting the lenders to withdraw from their commitments in the event of a change in management deemed by them to be adverse, Thomas, upon information and belief, after con-

sultation with and with the knowledge and approval of the conspirators, for the first time demanded, on threat of resignation, a substantial increase in salary and a lifetime retirement annuity of $50,000 per year. Toolco refused to recommend to TWA the acceptance of such demands under pressure of the financing but itself offered Thomas equivalent benefits. Thomas insisted that his demands should be met by TWA and upon information and belief, was supported in said demands by the conspirators.

93. Thereafter, on July 21, 1960, Toolco advised representatives of the lending institutions that Thomas, having finished the two years of service to which he was committed, intended to resign. Toolco proposed to the lenders that the financing proceed as planned upon the understanding that if a president of TWA acceptable to the lenders had not been found within 90 days Toolco would place its TWA stock in a lender-controlled voting trust. Representatives of Metropolitan and Equitable tentatively accepted this proposal but it was thereafter rejected by the conspirators. Upon informtaion and belief, the decision to reject the proposal was made jointly by Oates and Hagerty. The conspirators thereafter refused to acquiesce in any plan which would permit Toolco to name the president of TWA. When a compromise between Thomas and Toolco appeared probable, Thomas consulted Oates and Hagerty. Upon information and belief, they advised Thomas not to accept any compromise but to resign. Thomas did so. Immediately upon his resignation the conspirators claimed that there had been an adverse change in TWA's management and, exercising the out which they had insisted be included [856] in the loan agreements, cancelled the lenders' commitments to TWA under said agreements.

94. Thereupon the conspirators entered upon a course of conduct designed and calculated to compel Toolco to place its TWA stock in a lender-controlled voting trust and to give to the conspirators control of TWA:

(a) The conspirators agreed to proceed with the Dillon Read Plan if, but only if, by September 1, 1960, Toolco placed its TWA stock in a voting trust prior to any financing. The maturity of the TWA debt which Toolco had guaranteed was extended to September 1.

(b) Irving insisted as a condition to its consent to the extension of the maturity of the interim bank debt that TWA accept no further deliveries of jet aircraft.

(c) Although Toolco repeatedly offered to recommend a president for TWA acceptable to the lenders and although Toolco proposed for their consideration several qualified executives and offered to consider any alternative suggestions the lenders might make, the conspirators refused to consider any of Toolco's proposals or make any alternative suggestions.

(d) Irving was requested by Toolco to formulate and implement a new financing plan which would not require Toolco to place its TWA stock in a lender-controlled voting trust. Irving through Sessel agreed with Toolco to use its best efforts to formulate such a plan. [857] During August and September, 1960, Irving represented to Toolco that it was diligently engaged in doing so. When Toolco sought to participate in negotiations and discussions which Irving represented were in progress, Irving further represented to Toolco that such participation would be inadvisable and did not permit Toolco to participate therein. By such representations, Irving led and induced Toolco to refrain from making any efforts to secure financing for TWA elsewhere or to obtain for itself financing required to repay its obligations to Irving and others incurred for the benefit of TWA.

(e) Upon information and belief, Irving refused to permit several large banks which were not a part of the Irving banking group as previously formed to participate in formulating and implementing a financing program although Irving knew that such banks were prepared to participate therein. Irving concealed from TWA and Toolco the willingness of such banks to participate in a banking group without a voting trust.

(f) The conspirators realized that any extended delay in the arrangement of permanent financing would cause a substantial delay in the delivery of Convair aircraft to TWA and that the damage which would result from such a delay created pressure upon Toolco and TWA to yield to their demands.

(g) Irving finally presented to Toolco a plan on September 26, 1960 (hereinafter "the Bankers' Plan"). Irving knew or should have known that the Bankers' Plan [858] as submitted could not be effectuated. The Bankers' Plan contemplated that General Dynamics would participate in the financing to the extent of $40 millon but as Irving knew or should have known General Dynamics did not have the available resources to extend a $40 million credit. Toolco accepted the Bankers' Plan in order to avoid the damage to TWA which would result from a delay in arranging financing for the Convair aircraft.

(h) General Dynamics sought to obtain the support of Prudential, its traditional senior lender, in order to supply the $40 million credit which the Bankers' Plan contemplated. Upon information and belief, Prudential consulted one or more of the conspirators and thereupon refused to give the required support. Toolco thereupon made arrangements to relieve General Dynamics of a substantial part of General Dynamics' commitment under the Bankers' Plan by itself supplying an additional $30

million to be realized through the liquidation of assets unrelated to TWA. It negotiated, prepared, executed and delivered to Irving a plan which was substantially identical to the Bankers' Plan except for this change.

(i) On October 6, 1960 Irving and its associated banks met, avowedly to consider Toolco's proposal. A representative of Equitable attended this meeting. Upon information and belief, prior to the presentation of Toolco's plan, Sessel advised the banks that Hughes had stated that a voting trust would be preferable to receivership and thereupon the banks agreed that they [859] would not consider Toolco's proposal and that in order to pressure Toolco and Hughes into a voting trust they would inform Toolco's representatives that (i) no more loans would be made to TWA without an immediate voting trust agreement, (ii) the banks would proceed with the Dillon Read Plan if the insurance companies would also do so, (iii) should Toolco and Hughes not accept the Dillon Read Plan with a lender-controlled voting trust, Irving and the other banks would set off at the opening of business on October 7 deposit balances against outstanding loans to TWA and Toolco and (iv) the banks' decision was final, no more plans would be considered and Toolco and Hughes would have until 5:00 P. M. Eastern Daylight Saving Time to accept the banks' demands.

(j) In midafternoon Toolco's representatives were called into the meeting. Pursuant to the agreement theretofore made, Sessel, as spokesman, stated to Toolco that its proposal was totally unacceptable and refused to permit any discussion thereof. He further stated that the banking group would not agree to any financing plan for TWA which did not require Toolco to place its TWA stock in a lender-controlled voting trust. He demanded that before 5:00 P. M. EDT Toolco agree by written document

executed by its then president, Hughes, to accept the Dillon Read Plan with such a voting trust. He stated that if the demands of the banks were not met he would place Toolco in receivership. He further threatened that unless Toolco agreed to a lender-controlled voting trust he would collect summarily the substantial indebtedness owed to Irving [860] by Hughes personally which had no relationship to TWA or Toolco, which debt was not yet due but the maturity of which could be accelerated, and proceed immediately with a private foreclosure of Hughes' stock in Toolco which had been pledged as security for Hughes' debt to Irving.

(k) Prior to 5:00 P.M. Toolco acceded to the demands of Irving provided that TWA be given the right to refund without premium or penalty the senior indebtedness to be provided to TWA and that Toolco be entitled to purchase all such indebtedness at 100% of the principal amount plus accrued interest. Irving and the other banks agreed to such a provision and a representative of Equitable who was present at the meeting accepted it in principle.

(l) Thereupon Metropolitan after consultation with other of the conspirators demanded for the first time that Toolco's right to acquire the bank and insurance company debt and thus terminate the Voting Trust be subject to the payment of a penalty to be initially 22% of the principal amount of the insurance company debt, plus accrued interest, i.e., $20,416,000. This punitive and unprecedented demand was designed solely for the purpose of preserving the lender-controlled voting trust.

(m) Toolco promptly submitted to Equitable an alternative proposal which contemplated a voting trust but reserved to Toolco a right to purchase the senior notes for 100% of their principal amount plus accrued interest. In order to replace the participa-

tion of [861] Metropolitan and to reduce Equitable's participation to an amount not greater than its existing loan to TWA, Toolco, in this proposal, committed to take $67.3 million of the sinking fund notes. Although this proposal afforded the lending banks an improved security position, Irving peremptorily refused to consider the plan on the ground that it and its associated banks did not want to do business with Hughes.

(n) Thereafter, on October 19, 1960, Equitable and Metropolitan, with full knowledge of the pressure upon Toolco and TWA to accept any demands in order that Convair aircraft might be delivered to TWA as soon as possible, stated in identical terms to Toolco and TWA their willingness to reinstate the Dillon Read Plan, provided that (i) Toolco agree to place its TWA stock in a lender-controlled voting trust; (ii) Toolco consent to a penalty in the initial amount of 22% on $92,800,000 as a condition to termination of the Voting Trust by the refinancing of the loans to TWA; (iii) the by-laws of TWA (providing for reconstitution of the TWA Board of Directors by a majority of the stockholders at any time without cause) remain unchanged; and (iv) no employment contract be made with an executive officer of TWA providing for tenure of office beyond the date of the next annual election of officers. The additional demands thus made were designed and calculated to give to the conspirators the power to determine the management of TWA, including its chief executive officer, to reconstitute the Board [862] of Directors of TWA at will, and to manage and control the business and affairs of TWA in such manner as they should determine.

(o) Also on October 19, 1960, Irving made a similar proposal to TWA and Toolco. Irving stated (i) that acceptance of Metropolitan's and Equitable's proposals was a prerequisite to any commitment by

it and its participating banks, and (ii) that in the event it, as agent for the other lending banks, did not have Toolco's unconditional agreement in writing to its proposal by October 21, 1960, Irving and the other lending banks would enforce their rights of collection of TWA's debts by all available remedies, including the right of set-off.

(p) Toolco received the October 19 letters on Friday, October 21. Toolco endeavored to negotiate a reduction of the 22% premium but the conspirators remained adamant. Thereupon, Toolco entered into an oral understanding with Irving that on Monday, October 24, a full quorum of TWA's Board of Directors would be asked to pass upon the financing after the Toolco nominee directors had been notified that they no longer could assume that they were being indemnified by Toolco. On the basis of this understanding with Irving, Toolco accepted the October 19 demands of the lending institutions.

(q) Irving refused to honor its agreement to permit TWA's full Board of Directors to consider the October 19 proposals. Toolco, therefore, on October 22, 1960, notified the lenders that it no longer considered [863] itself bound by its conditional acceptance thereof. Toolco also notified Irving that it would seek to find other sources of financing to replace Irving and its banking group. Thereupon Irving and certain members of said banking group commenced offsetting TWA and Toolco balances against TWA's debt to such banks. At the same time, widespread publicity was given in the press and otherwise to accounts of Toolco's withdrawal of its conditional acceptance of the October 19 proposals. Said accounts were false and misleading and calculated to injure the reputation of Toolco. Upon information and belief, such false and misleading publicity emanated from Irving and Sessel, was known to them to be false and misleading and was designed by them

to preclude TWA or Toolco from finding any source of financing for TWA's jet equipment program other than Irving and its associated banks and Metropolitan and Equitable and then only upon terms which included a lender-controlled voting trust.

(r) Thereafter, Toolco endeavored to develop an alternative plan for financing TWA's requirements. Toolco's efforts to develop such a plan were unsuccessful for reasons which included (i) the unwillingness of other lending institutions to finance TWA without the approval and support of Equitable, TWA's traditional senior lender, (ii) the control and domination by Metropolitan, Equitable and Prudential of the market for major airline financing, and (iii) the attitude of the financial community which was based on erroneous [864] assumptions of fact arising from the false and misleading statements of Irving and Sessel. Faced with no alternative by reason of the unlawful conduct of the conspirators, Toolco on November 30, 1960, committed itself to accept the lender-controlled voting trust, the additional demands of the conspirators and the Dillon Read Plan.

95. Thereafter, in December, 1960, the necessary transactions and agreements to effectuate the Dillon Read Plan, to place the common stock of TWA owned by Toolco in a lender-controlled voting trust, and to comply with the additional demands of the conspirators were effected. By the terms of such agreements, the conspirators acquired and now possess the power to control the business and affairs of TWA. In furtherance of the conspiracy hereinabove alleged the conspirators since December, 1960 have used the power so acquired:

(a) To install a management of TWA which is responsive to them rather than to the owners of TWA;

(b) To prolong and perpetuate their control of TWA by (i) prolonging and perpetuating the Voting

Trust and (ii) frustrating the option which they gave to Toolco in December, 1960 to regain control of TWA by acquiring, upon the payment of applicable penalties, all the Series A Sinking Fund Notes and Series A Serial Notes;

(c) To impose upon TWA commitments which extend beyond the term of the Voting Trust and which are not related to the repayment of the loans in connection with which the Voting Trust was created;

(d) To gain for themselves financial advantage [865] at the expense of TWA through making additional loans to TWA under conditions which are not competitive; and

(e) To maintain TWA as a captive market for additional senior financing.

Breech, notwithstanding the fiduciary duty which he owed to Toolco as the equitable owner of the 78.2% of TWA's stock which he held in trust, while serving as voting trustee and as Chairman of the Board of Directors of TWA has participated in the acts and course of conduct by which such objectives have been attained; Tillinghast who was elected president of TWA in the manner hereinabove alleged has furthered the efforts of the lending institutions to maintain control of TWA through the voting trustees; and Breech and Tillinghast joined the conspiracy hereinabove alleged.

96. Since December 1960, the conspirators have done or caused to be done the following in furtherance of said conspiracy:

(a) On February 28, 1961, TWA's Board of Directors was reconstituted so that a majority of said Board consisted of persons of the conspirators' choosing. Thereafter, on April 27, 1961, the TWA Board of Directors was further reconstituted by removing therefrom all directors who represented

the interests of Toolco, with the single exception of Holliday, the voting trustee named by Toolco. Breech caused himself to be elected chairman of TWA's Board of Directors as so reconstituted.

(b) The conspirators selected Tillinghast to be TWA's president and chief executive officer and, upon information and belief, at or about the time of his selection explained to him the nature of the conspiracy [866] and the contemplated course of conduct which would prevent Toolco from regaining control of TWA. The conspirators thereafter caused TWA to enter into a contract by which upon Tillinghast's retirement at any time following the termination of the Voting Trust and whether or not he has rendered any services to TWA (or upon his retirement at any other time after five years) he shall receive a pension for ten years, said pension being in the amount of $50,000 per year until he reaches age 65 and $30,000 per year thereafter, all as more fully alleged in paragraph 53 hereof.

(c) The conspirators have failed for reasons unrelated to any proper corporate or business purpose of TWA, to take advantage of opportunities to strengthen TWA's business. One of such opportunities which they have failed to pursue is that of a merger of Northeast into TWA. Because of TWA's route structure the traffic on its routes for many years has decreased sharply in the winter months. To remedy this seasonal imbalance Toolco in 1960 entered into negotiations with Atlas Corporation, the controlling stockholder of Northeast, looking toward a merger of Northeast with and into TWA. Northeast by reason of its east-coast route to Florida has a sharp seasonal imbalance which is the reverse of that of TWA. Such negotiations, which were carried on with the knowledge of TWA, culminated in May, 1960 in an agreement of merger which Atlas Corporation and Toolco agreed to rec-

ommend to the Board of Directors of Northeast and TWA, respectively. Under the merger [867] agreement, the merger was subject to Board approval and to approval by a majority of the shareholders of TWA other than Toolco. Breech and Olds, with full knowledge of the agreement thus made by Toolco with Atlas Corporation, failed to recommend the merger to the TWA Board of Directors and the conspirators failed to take action to consummate a merger with Northeast either on the terms negotiated by Toolco or on other appropriate terms, notwithstanding the suggestion made by Toolco in May, 1961 that it was willing to discuss with TWA the possibility of Toolco's assuming any financial risk that such a merger might otherwise impose upon TWA and notwithstanding the recommendations of TWA's operating personnel that such a merger was in the best interests of TWA.

(d) For reasons unrelated to any interest of TWA, the conspirators refused to grant Toolco's request for a one week's postponement in an offering by TWA of $111,235,900 principal amount of subordinated debentures with warrants attached. This offering was being made to TWA's stockholders pursuant to agreements made in December, 1960 at the time of the creation of the Voting Trust. The purpose of the offering was to refund an interim note of $100 million which was accepted by Toolco in payment of obligations of TWA to it. By the terms of said agreements the entire proceeds of the offering would be paid to Toolco, which had agreed to purchase all unsubscribed debentures up to a principal amount of $100 million, unless Toolco exercised an option to subscribe to all the debentures to which [868] others did not subscribe. Toolco desired a postponement of the offering in order that it might make a simultaneous secondary offering of both the debentures which it was obligated to purchase and those which it had the option to purchase. Such a second-

ary offering would have permitted TWA to obtain an additional $11,235,900 in junior capital and Toolco to obtain $100 million in cash. Upon information and belief, the conspirators refused Toolco's request for a week's delay in order to prevent Toolco from obtaining cash resources which might be used to purchase the Series A Sinking Fund Notes and Series A Serial Notes and thus to terminate the Voting Trust.

(e) The conspirators entered into agreements with Boeing for the purchase of additional jet aircraft from Boeing, even though, upon information and belief, the number of aircraft which TWA agreed to acquire was in excess of TWA's needs and financial capabilities. The total cost of such additional jet equipment is in excess of $187,500,000 and a primary purpose of the conspirators in entering into this program was, upon information and belief, to create a need for additional financing for TWA upon terms which would perpetuate their control of TWA.

(f) Toolco made various proposals to TWA which would have provided additional capital to TWA. One of such proposals would have guaranteed to TWA an additional $100 million of equity capital and was conditioned solely upon the termination of the Voting Trust. The conspirators refused to entertain any [869] of such proposals upon their merits and rejected or allowed such proposals to expire without any negotiations with respect thereto.

(g) On June 30, 1961, the conspirators caused TWA to file its complaint in the instant action in which TWA seeks, among other relief, to divest Toolco of its interest in TWA.

(h) Thereafter, without the approval by or consultation with Toolco or approval by the other stockholders of TWA, the conspirators caused TWA to enter into agreements with Metropolitan, with Equitable and with Irving and its associated banks

for the supplying of $147 million of additional financing to TWA. As more fully alleged in paragraph 53 hereof, the conspirators in connection with said additional financing caused to be executed a Supplemental Indenture giving to Metropolitan and Equitable the right to accelerate the maturity of said $147 million of indebtedness in the event the Voting Trust were to terminate whether in accordance with its terms or otherwise or in the event Toolco were to exercise the option given to it in December, 1960, to acquire the Series A Sinking Fund Notes and Series A Serial Notes upon the payment of the applicable penalty.

97. During the years in which Toolco nominated a majority of the directors of TWA, namely from 1947 through 1960, the business of TWA grew steadily. From 1947 through 1960 TWA's operating revenues grew more than four times. In 1960 TWA had earnings before taxes in excess of $15,000,000. During the years from 1947 through 1960 TWA realized earnings [870] before taxes of $95,600,000.

98. By reason of the unlawful conspiracy and acts hereinabove alleged:

(a) TWA's jet equipment program was disrupted and the delivery of jet aircraft which had been ordered by Toolco from General Dynamics for the benefit of TWA was delayed;

(b) TWA has been compelled to obtain financing upon unfavorable terms and at higher interest rates than it would have otherwise had to pay;

(c) TWA's assets have been wasted;

(d) TWA has lost valuable opportunities;

(e) The business and affairs of TWA have steadily deteriorated.

Upon information and belief, TWA in 1961 lost in excess of $30 million without regard to accelerated depreciation on piston aircraft and before applicable tax credits, or an adverse change from 1960 in excess of $45 million. TWA's present management estimated in September, 1961 that by March, 1962 TWA, which started 1961 with a favorable cash balance of more than $40,600,000, would have a cash deficit of $2,500,000.

99. By reason of the foregoing, TWA has suffered and is continuing to suffer substantial damages in its business and property, the exact amount of which is presently unknown to Toolco but which is, upon information and belief, estimated to be in excess of $45 million, which amount may become substantially greater as a result of the conspirators' continuing unlawful activities.

100. TWA is threatened with irreparable injury.

101. All additional defendants are necessary parties [871] to this counterclaim in order that complete relief may be granted.

AS AND FOR A FOURTH COUNTERCLAIM AGAINST TWA AND AGAINST ALL ADDITIONAL DEFENDANTS

102. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 62, 69, 70 and 73 through 97, inclusive, hereof.

103. Jurisdiction of this Court over this counterclaim arises from the violations of the antitrust laws herein alleged.

104. Since the creation of the Voting Trust, TWA, under and by reason of the control of the conspirators over its business and affairs, has participated in the acts and course of conduct by which the conspiracy has been furthered, as hereinabove more fully alleged.

105. By reason of the facts herein alleged, Toolco has suffered and is continuing to suffer substantial damages in its business and property, the amount of which is presently estimated to be in excess of $77 million, which amount may become substantially greater as a result of the conspirators' continuing unlawful activities.

106. Toolco is threatened with irreparable injury.

107. TWA and the additional defendants are necessary parties to this counterclaim in order that complete relief may be granted.

108. Toolco has no adequate remedy at law.

[872] As and for a Fifth Counterclaim Against TWA and Against All Additional Defendants

109. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 62, 69, 70 and 78 through 97, inclusive, hereof.

110. Jurisdiction of this Court is ancillary to its jurisdiction over the third and fourth counterclaims heretofore alleged in that this Court has jurisdiction to grant all available relief upon the facts therein alleged.

111. During 1960 Equitable, Metropolitan, Irving, Hagerty, Oates and Sessel, together with others, entered into a conspiracy to deprive Toolco of its voting rights with respect to TWA stock owned by it and thus to deprive Toolco of control of TWA. They made their demands for a lender-controlled voting trust not for the purpose of protecting any legitimate interest which they might have as lending institutions but rather for the purpose of injuring, maliciously and wilfully, Toolco and Hughes. In order to coerce and compel Toolco to place its TWA stock in such a lender-controlled voting trust, they, acting in concert, took or caused to be taken the actions alleged in paragraphs 90 through 94 hereof.

112. After Toolco, by reason of the wrongful activities of the conspirators, had been coerced and compelled to place its 78.2% stock interest in TWA in the Voting Trust, Breech and Tillinghast joined in the conspiracy hereinabove alleged and since January 1961, the conspirators, acting in concert and in furtherance of the objects of the conspiracy, have engaged in a course of conduct designed and calculated to interfere with Toolco's rights as the equitable owner of over 78% of the stock of TWA, to maintain and perpetuate the [873] Voting Trust and the control over TWA which the conspirators unlawfully acquired, and to manage the business and affairs of TWA in the interests of the conspirators and not in the interests of the owners of TWA. TWA, under the control of the conspirators, has participated in said course of conduct and the acts in furtherance of the conspiracy more fully alleged in paragraph 96 hereof.

113. Among the objectives of the conspiracy has been the creation and perpetuation of a voting trust for a period beyond that permitted by applicable law. Under Section 218 of the Delaware Corporation Law the maximum term for which a voting trust of a Delaware corporation may be created is ten years and a voting trust may be extended for an additional term of ten years only in the last year of said voting trust and then only in the manner provided in said Section 218. The conspirators required that Toolco agree in December, 1960 to extend the Voting Trust at the request of Irving as agent for the holders of TWA's Series A Sinking Fund Notes and Series A Serial Notes for an additional term not to exceed the maximum permitted by Delaware law and since the creation of the Voting Trust have sought to perpetuate the Voting Trust as hereinabove alleged without the consent or acquiescence of Toolco.

114. As a result of the acts of the conspirators hereinabove alleged, Toolco has suffered damages in an amount presently estimated to be in excess of $77 million.

115. The continuation of the conspiracy herein alleged will result in irreparable injury to Toolco.

116. Toolco has no adequate remedy at law.

117. TWA and all additional defendants are neces-
[874] sary parties to this counterclaim in order that complete relief may be granted.

AS AND FOR A SIXTH COUNTERCLAIM AGAINST TWA

118. Toolco repeats and realleges each and every allegation of paragraphs 42, 43 and 50 hereof.

119. As a part of the transactions in December 1960 by which TWA's jet equipment program was financed, Toolco accepted TWA's interim subordinated note in the amount of $100 million and TWA agreed to refund said note from an offering of subordinated income debentures and to pay interest on said note at the rate of 6½% per annum to the date of refunding.

120. TWA refunded said interim note on June 13, 1961 but failed and refused to pay interest to the date of such refunding on the entire principal amount of said note.

121. The amount of such interest which TWA failed and refused to pay is $72,089.55 and such amount remains due and payable to Toolco by TWA.

Prayer for Relief

WHEREFORE, Toolco prays judgment dismissing the complaint herein and further prays that this Court order, adjudge and decree:

With Respect to the First Counterclaim

1. That Equitable, Metropolitan and Irving be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

[875] 2. That the employment contract between Tillinghast and TWA in so far as it relates to the payment of any

pension or annuity be declared void and of no effect and that TWA be perpetually enjoined from paying any annuity or pension to Tillinghast thereunder.

3. That TWA, Breech, Tillinghast, Metropolitan, Equitable, Dillon Reed and Irving be perpetually enjoined from taking any action which is designed or would have the effect of preventing the termination of the Voting Trust in accordance with its terms.

4. That TWA, Breech, Tillinghast, Metropolitan, Equitable, Dillon Read and Irving account to Toolco for all damages suffered by Toolco by reason of the acts alleged in the First Counterclaim.

With Respect to the Second Counterclaim

1. That Equitable and Metropolitan have acquired control of TWA in violation of Section 408 of the Federal Aviation Act of 1958.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

[876]

With Respect to the Third Counterclaim

1. That the additional defendants have violated Sections 1 and 2 of the Sherman Act.

2. That Metropolitan and Equitable have violated Section 7 of the Clayton Act.

3. That the Voting Trust is invalid and void.

4. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

5. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

6. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

7. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from refusing to deal with TWA while it is controlled by Toolco.

8. That the additional defendants be perpetually enjoined from interfering in any way with the exercise by Toolco of its rights as a stockholder of TWA.

9. That the additional defendants pay to TWA $135 million, three-fold the demages sustained by TWA, and pay to Toolco its costs, attorneys' fees and expenses.

With Respect to the Fourth Counterclaim

1. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting [877] Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That Toolco may at any time acquire the Series A Sinking Fund Notes and Series A Serial Notes at the principal amount thereof plus accrued interest and without the payment of any premium or penalty.

4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

5. That the additional defendants Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from refusing to deal with Toolco and with TWA while it is controlled by Toolco.

6. That the additional defendants pay to Toolco the sum of $231 million, three-fold the damages sustained by Toolco, together with costs and attorneys' fees.

With Respect to the Fifth Counterclaim

1. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That Toolco may at any time acquire the Series A Sinking Fund Notes and Series A Serial Notes without the payment of any premium or penalty.

[878] 4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

5. That the additional defendants pay to Toolco damages in the amount of $77 million.

With Respect to the Sixth Counterclaim

1. That Toolco recover damages in the amount of $72,089.55 together with interest from and including June 13, 1961.

TOGETHER WITH Toolco's costs and disbursements and such other, further and different relief as to the Court shall seem just and proper.

Dated: New York, N. Y.
February 12, 1962.

/s/ CHESTER C. DAVIS

Chester C. Davis
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

[879]

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

RAYMOND M. HOLLIDAY, being duly sworn, deposes and says that he resides at Houston, Texas; that he is Executive Vice President of Hughes Tool Company, a corporation, defendant herein; and that he has read the foregoing answer and counterclaims and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to such matters believes them to be true.

/s/ RAYMOND M. HOLLIDAY

Subscribed and sworn to before me this
12th day of February, 1962.

/s/ DALLAS KELLER
Notary Public in and for
Los Angeles County, California.

My commission expires July 23, 1963

District Court Order, August 14, 1961

[408]

[CAPTION] 61 Civil 2324

MEMORANDUM

The motion of defendant Hughes Tool Company is hereby granted as follows: the taking of depositions pursuant to the plaintiff's notices served on August 1, 1961 shall be, and hereby are, stayed until defendant Hughes Tool Company shall have completed the taking of depositions pursuant to the notices which said defendant served on August 3, 1961.

By force of the understanding of counsel and Judge Dimock's order of July 7, 1961, the August 3, 1961 notices of said defendant are deemed to have been made between July 7, 1961 and July 20, 1961. On the other hand, by force of said understanding and order, plaintiff's August 1, 1961 notices are deemed to have been made after July 20, 1961, because said notices of plaintiff without leave of court would be permitted under F.R.C.P. Rule 26(a) only after [409] July 20, 1961.

Consequently, said defendant has priority in the taking of depositions under the general rule that, in the absence of some special and good reason, pre-trial examinations should proceed in the order in which they are demanded.

The dispositive issue is whether the record before the Court evidences special circumstances warranting a departure by this Court, in its discretion, from the general rule.

The Court has concluded that the plaintiff has not made such a showing. The Court will adhere to the general rule. So ordered.

As this memorandum-decision constitutes an order, no settlement is necessary.

/s/ WILLIAM B. HERLANDS
U.S.D.J.

August 14, 1961.

Pretrial Order, March 5, 1962

[1113]

[CAPTION] 61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held in this cause on February 23, 1962, wherein the following proceedings were had.

• • •

[1114]

II.

Counsel for all the additional defendants who appeared on this hearing have joined in an application that they be granted priority of deposition after the defendant Hughes Tool Company shall have completed its deposition of plaintiff Trans World Airlines.

[1115] This litigation is a complicated one. Plaintiff has asserted claims of violations of the antitrust laws against the defendants. Defendant Hughes Tool Company, by its answer, has asserted counterclaims against plaintiff and the additional defendants for alleged violations of the antitrust laws. The asserted damages on both sides can well exceed $500,000,000. At the outset of the litigation last summer defendant Hughes Tool Company obtained priority in the deposition-discovery procedures. The case was then assigned to me for all purposes pursuant to General Rule 2(b) of this court. On February 7, 1962 a pretrial order was entered scheduling the depositions to be conducted by the Hughes Tool Company. This schedule calls first for the testimony of the plaintiff and then for the testimony of twenty-one witnesses. Defendant Hughes Tool Company had not by that time served its answer, but this it did on February 13, 1962, the first day set for depositions. Eight of the designated witnesses were made additional defendants by virtue of the alleged counterclaims. The ninth additional defendant is the president of Trans World Airlines who is presently being deposed.

While the courts have adopted a normal rule of priority depending on time of service of a notice to take deposition, and the necessity for a defendant to obtain particulars of the charges leveled against him because of the notice form of pleading, such rules are not rigid in their application

and must yield in unusual circumstances [1116] to the ultimate goal of prompt, orderly and fair disposition of the litigation. Furthermore, the plaintiff who instituted the litigation must not be lost sight of in the maze that has resulted from the pleadings. The service of a notice to take depositions six months before answer cannot afford the defendant Hughes Tool Company the right of priority insofar as its counterclaims are concerned. Consequently, the schedule of depositions contained in the pretrial order of February 7, 1962 is amended as follows:

Defendant Hughes Tool Company may continue the depositions scheduled, limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company. Since a Special Master is presiding over the depositions on a day-to-day basis, he will see to the application of this limitation. Upon completion of this phase of defendant's depositions, the plaintiff shall proceed with its depositions in the order provided in the pretrial order of February 7, 1962. The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions. At the conclusion of the deposition proceedings by the additional defendants, the defendant Hughes Tool Company may then resume and complete its deposition proceedings.

III.

Arrangements shall be made by counsel for fixing [1117] a hearing date on motions to dismiss the counterclaims. Such hearing date shall be three days after the completion of the exchange of moving papers, answering papers and reply papers.

So Ordered.

Dated: New York, New York
March 5, 1962

/s/ Charles M. Metzner
Charles M. Metzner
U. S. D. J.

Pretrial Order, July 12, 1962

[1433]

[CAPTION] 61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held today on the respective appeals by the plaintiff and defendant Hughes Tool Company from rulings of the Special Master.

1. Defendant Hughes Tool Company appeals from a ruling of the Special Master overruling Toolco's objections to interrogatories propounded to it by plaintiff. After hearing counsel and reading the papers submitted in support of and in opposition to the appeal, the ruling of the Special Master is modified as indicated below and as modified is sustained.

[1434] Interrogatory No. 1 is modified by striking the words "or attorney". It is further modified by limiting any knowledge, information or belief of a director to such knowledge, information or belief which said director has acquired as a director of the defendant Toolco.

As to Interrogatory No. 4, the defendant need not make any answer thereto insofar as any of the named persons in this interrogatory are former employees or consultants. However, the defendant in its answer to this Interrogatory No. 4 shall indicate which of said persons are former employees or consultants. Insofar as consultants are concerned, the term shall embrace those persons who are in normal usage considered as independent contractors.

Interrogatory No. 7 refers to employees, agents and/or representatives of Toolco. The information requested by this interrogatory shall be furnished as to such persons only if those persons performed services of a personal nature or otherwise for Hughes individually and if such services were compensated for by the defendant and not by Hughes personally.

The dates referred to in the interrogatories shall be computed from the date of this order.

2. Plaintiff has appealed from a ruling of the Special Master denying the motion of the plaintiff for an order

determining that rule 4 of the Civil Rules of the United States District Court of the Southern District of New York is applicable in the instant case. After hearing [1435] argument of counsel and reading the papers in support of and in opposition to this motion, the appeal is disposed of as follows:

Irrespective of rule 4, the court has the power to vary any order heretofore entered fixing priority of deposition-discovery proceedings. In view of the number of days which the defendant Toolco has devoted to the deposition of Tillinghast, the president of the plaintiff, defendant is directed to complete that deposition on or before July 25th, 1962. It shall commence taking the depositions of the other noticed individuals immediately thereafter. Plaintiff may renew its motion before the Special Master on September 20th, 1962 if at that time it is advised that the depositions scheduled upon the completion of the Tillinghast deposition are not moving as expeditiously as possible, and that any further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff.

So Ordered.

Dated: New York, N. Y.
July 12, 1962

Charles M. Metzner /s
U. S. D. J.

Pretrial Order, January 10, 1963

[2489]

[CAPTION] 61 Civ. 2324

ORDER

[2490] A pretrial conference was held on January 9th, 1963 to consider various matters brought to the court's attention by notices of appeals from rulings of the Special Master. These matters are disposed of as follows:

1. The appeal by TWA, pursuant to a telephonic request, to review an order of the Special Master adjourning the deposition of Howard R. Hughes to February 11th, 1963 is withdrawn by counsel for TWA pursuant to an application filed January 8th, 1963.

2. The appeal by Hughes Tool Company dated January 3rd, 1963 seeking to review an order of the Special Master dated December 28th, 1962 denying Toolco's application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Co. by Wadsworth is denied and the ruling of the Special Master is affirmed. The court adopts the statement of the Special Master appearing on page 11 of the transcript of proceedings before the Special Master dated December 28th, 1962, which states:

> "I do not think it [the depositions of Sessel and Wadsworth] would advance the proper administration of this case [2491] since it would in my judgment inevitably branch out into the issues of the counter-claims, or result in such continuous controversy as to the exact limits of such issues that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed."

The court has previously indicated that priority of deposition is not sacrosanct, and even without the adoption as of July 1st, 1962 of rule 4 of the Civil Rules of this district the court has the power to alternate the taking of depositions by the parties.

During a ten-month period the defendant has conducted over 80 days of depositions of the plaintiff, which have consumed over 10,000 pages of testimony. It will have substantially completed the deposition of the plaintiff this month with the testimony of Cocke and Leslie. It has then scheduled the depositions of other witnesses, including Sessel and Wadsworth, which can consume a very long period of time. The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward. This deposition was originally scheduled for September 24th, 1962 and then adjourned to October 29th, 1962. It has now been adjourned to February 11th, 1963 and this date will be adhered to in the absence of extraordinary circumstances. The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.

[2492] Furthermore, the completion of such deposition will advance materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served on October 11th, 1962 and the further interrogatories served on November 13th, 1962.

The court concurs in the ruling of the Special Master contained in his order of December 28th, 1962 clarifying his order of October 25th, 1962, directing that Howard R. Hughes appear on February 11th, 1963 for deposition in Los Angeles. The return date of the subpoena served on September 6th, 1962 as adjourned by order of this court dated September 21st, 1962 and the notice to take deposition are adjourned to February 11th, 1963 at the same time and place. The provisions of the order of this court dated

September 21st, 1962 are reaffirmed and reiterated, and Mr. Davis is directed to notify Howard R. Hughes of the directions of the court contained in this order by telephonic communication and by written communication to be made and sent by 5 p.m. on January 11th, 1963.

3. The motion by Hughes Tool Company, pursuant to rule 16 of the Federal Rules of Civil Procedure, to authorize the Special Master to conduct pretrial conferences, with recommendations to the court for the form and terms of a pretrial order defining and limiting the legal and factual issues in this case, is denied without prejudice to a renewal 30 days after the completion of the deposition of Howard R. Hughes.

[2493] 4. The appeal by Hughes Tool Company dated September 19th, 1962 from an order of the Special Master made on September 15th, 1962 which requires Hughes Tool Company to produce for inspection and copying by opposing counsel, prior to a further definition of the issues, the documents with respect to which Hughes Tool Company claims attorney-client privilege is denied and the order of the Special Master is affirmed.

A reading of the briefs and the oral argument would indicate that the application under advisement is in fact a reargument of the order of this court dated July 24th, 1962. At that time the court indicated that it had reviewed the opinion of the Special Master which appeared in the transcript at pages 4361-4391 and the letters of the Special Master dated May 2nd, 1962 and May 3rd, 1962. The court concurred with the opinion of the Special Master and directed that if there were any specific documents concerning which Hughes Tool Company desired specific rulings they should be submitted to the Special Master.

At pages 122 et seq. of the transcript of September 15th, counsel for the Hughes Tool Company stated that he had made available to the Special Master the documents concerning which the defendant was asserting the attorney-client privilege. Counsel went on to state that the docu-

ments were made available for a ruling by the Special Master not as to whether they would be normally covered by the attorney-client privilege, but "whether or not the attorney-client privilege had been waived." He then went on to say at page 124 that:

> [2494] "What is developing is simply the question of the procedure to be followed in obtaining rulings of the Special Master with respect to individual documents, applying the principles of law announced by the Special Master and affirmed by Judge Metzner, and the only area which I am aware constitutes a difference of opinion; perhaps, is whether those documents are to be produced at this time on the ground that prior to this time there had been a waiver of the privilege."

Documents heretofore submitted to the Special Master shall be made available to all parties by noon on January 14th, 1963. If there are any additional documents to which the defendant Hughes Tool Company asserts a non-waived attorney-client privilege, such documents shall be submitted for a ruling to the Special Master by noon of January 14th, 1963 and a list thereof furnished at the same time to counsel for all parties.

5. The appeal by TWA, pursuant to a telephonic request, to review an order of the Special Master denying its motion to quash or strike interrogatories served by Toolco on October 11th, 1962 is denied except that the order of the Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection to specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

6. The appeal by TWA dated December 20th, 1962 from an order of the Special Master appearing in the transcript of the proceedings before the Special Master on December 3rd, 1962 is denied except that the order of the [2495]

Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection to specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

So Ordered.

Dated: New York, N. Y.
January 10, 1963

Charles M. Metzner /s
U. S. D. J.

Pretrial Hearing, February 6, 1963.

[24841]

[CAPTION] 61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge

[24842]

New York, February 6, 1963, 5:05 P.M.

[APPEARANCES]

[24843]

• • •

The Court: Before we commence arguing on motions, does anybody have a copy of the CAB order of December 29, 1960? That was not public, as far as I could find.

Mr. Davis: We could have it before the close of the argument.

The Court: Secondly, Mr. Sonnett, your brief, on page 40 you refer to intermediate orders of the CAB in this matter. Do you have copies of those?

Mr. Sonnett: I do not, your Honor, have them with me but I can get them readily, I think.

The Court: Would they indicate what the Board was asked to do aside from just a three or four-line alternate finding?

Mr. Sonnett: I can't answer that question until I have another look at that.

The Court: All right.

[24844] Mr. Davis, you may proceed.

Mr. Davis: May it please the Court, I would like to say preliminarily that I put my energies in the paper that we prepared for submission to the Court and I am a little hoarse and hard of hearing today.

I would like, if I may, to reserve as much of the time that the Court would be inclined to allow me to reply to whatever argument counsel for TWA may present, because I believe that our position is adequately set forth in our memorandum and reply memorandum.

In that connection, your Honor, I am not personally aware of when that reply memorandum was in fact delivered to your Honor's chambers.

The Court: Before lunch.

Mr. Davis: May I assume that you are familiar with the contents of that memorandum?

The Court: It was read in detail. Luckily I did not have to hold court this afternoon because I had to review some 3500 material and grand jury minutes for the grand jury tomorrow morning. I spent all afternoon on your reply brief.

Mr. Davis: Then apart from answering [24845] whatever questions I may be able to answer, I can state my position very briefly.

I want to emphasize first of all that we are not bringing on the motion for summary judgment under Rule 56. We have withdrawn that motion for the reasons stated in our memorandum. I can expand those reasons, if they would be a matter of interest.

The Court: No, I don't think it is necessary. I disagree with the reason you give or the indication you are compelled to withdraw your motion.

Mr. Davis: Then I would like to emphasize that so far as the motion we are bringing on is concerned, we are relying solely on the allegations of the complaint; we are not going outside of it.

In the introductory statement of our memorandum in connection with the explanation I attempted to set forth reasons why we wanted to withdraw our motion for summary judgment. I did refer to the testimony of Mr. Til-

linghast and other officers, and the comment of the special master with respect to that testimony but only for the purpose of explaining the [24846] posture that the Tool Company found itself in.

The Court: I think you have a problem we can overcome simply. I am going to decide this as a motion for judgment on the pleadings in so far as that particular claim of yours is concerned.

You are in a procedural dilemma. You are withdrawing the motion for summary judgment, and yet you have gone outside the face of the complaint, and necessarily so, because the face of the complaint does not mention the orders and exemptions which you rely on as your third affirmative defense. Consequently since you have answered and raised that issue by your third affirmative defense I will consider this as a motion for judgment on the pleadings to get over whatever procedural hurdle you would have in arriving at your first determination for the first grounds of dismissal.

Mr. Davis: May I state in that connection?

The Court: Under the Putnam case the complaint would withstand a motion to dismiss under 12(b)(6). We will get to the merits of your ground without being held up by any procedural problem.

[24847] Mr. Davis: May I merely state then that my position with respect to referring to the CAB orders, I did not refer to all of the many CAB orders which approve particular transactions between the Tool Company and TWA because my position is that it is immaterial whether they were in fact in violation. If not, we were in violation of CAB orders; and if they were, we were not.

I refer to the orders issued by CAB under 408, because to my mind those are quasi-judicial decisions which under the law, as I understand it as reflected by the decision of the Supreme Court in Panagra, it is a matter which needs to be considered as a matter of law, the legal effect of those particular orders of the CAB.

Having made those observations, your Honor, I believe that I can only address myself to answering questions, answering the position taken by TWA. I can anticipate to some extent, I think, in my reply memorandum I have adequately made clear that there is no basis for the distinction between the conduct alleged in 1961 and that alleged prior to 1961, so far as the contention is that such conduct was in violation of the antitrust laws. I can [24848] expand on that, although my reply memorandum, it seems to me, adequately takes care of that contention.

I think I would just be taking up the Court's time unnecessarily if I repeated what I set forth in my memorandum, reply memorandum.

The Court: Mr. Sonnett.

Mr. Sonnett: TWA submits on the papers before your Honor, unless there is some question you have of me.

The Court: I have no question.

I received Mr. Davis' reply at noon last Friday. I received your brief at noon last Saturday, and I worked Friday night, Saturday, Sunday, Monday night and last night, and I called for this hearing on the chance that maybe Mr. Davis could persuade me that the conclusion I had reached on reading the briefs and studying them and checking the law was wrong. Mr. Davis wants me to rely on his papers. Consequently I will deny the motion to dismiss the complaint. This is the order of the Court and a formal opinion will follow in the next day or two.

Mr. Davis: Your Honor, may I respectfully [24849] request then that in your opinion you certify the matter, 1292, so that I may obtain a discretionary review by the Court of Appeals?

The Court: The application is denied.

Mr. Davis: May I respectfully request your Honor to stay all further discovery proceedings by the plaintiff until I have had an opportunity to seek a discretionary review by the Court of Appeals?

Pretrial Hearing, February 6, 1963.

The Court: Are you referring to the production of the documents under my pretrial order or [sic] January 19th of the tax papers covered by the orders of February 1st, or the deposition of Mr. Hughes, now scheduled for February 11th?

Mr. Davis: I was referring to all further pretrial proceedings, your Honor, because of the unquestioned burden and expense that the Tool Company will withstand if we are to continue to litigate with a view toward having a trial prior to our effort to obtain a review as to whether the determination made today on our motion to dismiss is not upheld.

It seems to me it is difficult, although I would be willing to cooperate if it would be helpful in any way, to separate how far to go and [24850] where to stop.

The desire of the Tool Company is to seek an early and expeditious disposition of this litigation, particularly since it is bearing 78 per cent of the cost of this prosecution. Therefore it would be extremely burdensome, assuming that the Court of Appeals will review the basis for our motion to dismiss, upon the Tool Company to be incurring those very substantial expenses pending a review of that question by the Court of Appeals.

It seems to me, your Honor, that there is at least a very substantial question raised by the decision of the Supreme Court in the Panagra case as to whether or not this court should entertain jurisdiction of the questions raised by this complaint.

Granted that this decision in the Panagra case in some respects, as the dissenting opinion indicates, digressed from a prior determination of the Supreme Court and therefore to that extent may be regarded as a new and important question, but I find it difficult to conclude that the Court should not consider the fact that there is a very serious question involved, a question of law.

[24851] The Court: I will tell you what I will do. I will grant your application to the extent of staying all further discovery or deposition proceedings until 5 o'clock Friday. That will give you two days to make whatever application you wish to make to the Court of Appeals for a stay.

Mr. Davis: All right, your Honor.

The Court: Today is Wednesday, and you have tomorrow and Friday to draw your papers up and go to the Court of Appeals and ask for a stay. My stay will expire at 5 o'clock Friday, February 8th.

I have been bombarded with briefs, memoranda, motion papers and letters, and I have difficulty keeping abreast of them all. Let me see if I can find what I am looking for.

Mr. Davis: Is your Honor referring to this notice of motion that we made?

The Court: I am referring to a letter that you wrote to Judge Hall.

Mr. Davis: I wrote two. One was in response to a letter from Mr. Rankin to Judge Hall.

The Court: The earlier one you sent to Judge Hall without sending copies to the special [24852] master, who is counsel to the Court.

Mr. Davis: I received information that there had been communications with Judge Hall of which I did not receive a copy. I did not know what they were. The only information I received; I think, was at the time Mr. Sonnett filed with your Honor a memorandum indicating some representative had communicated with Judge Hall.

I never received a copy of any communication by anyone contacting Judge Hall until I received a copy of a letter by Mr. Rankin. Mr. Rankin has indicated that he would contact Judge Hall, and I was waiting for him to do so in order to address myself to that question. Then, as I recall it, I received a copy of a communication by Mr. Sonnett to your Honor indicating that someone in California had contacted

Judge Hall and the United States marshal out there. That is what, as I recall, produced my first letter. Shortly thereafter, as I recall it, I received a copy of a letter from Mr. Rankin to Judge Hall and I addressed myself to that letter.

The Court: I can't find it offhand with all these papers that have come in in the last [24853] two weeks.

What I was looking for that letter for was an indication that you had made in that letter, as I recall it, that until the Court had ruled upon your motion to dismiss you saw no reason why arrangements should not be made—or why arrangements should be made for the deposition of Mr. Hughes on February 11th.

In your letter of February 4th to the special master, a copy of which was furnished to me on February 5th by Mr. Hupper, of counsel to the insurance companies, the additional defendants in this case, you stated as follows:

> "As I explained to you in our telephone conversation, Toolco is taking the action indicated above without prejudice to its position that at this time it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants. Rather than submit to further discovery on the record to date Toolco reserves the right, if it becomes necessary to do so, to elect not to defend on the merits.
>
> "It is, of course, the expectation of Toolco [24854] that the disposition of its pending motion to dismiss will obviate the necessity of pursuing the matter further.
>
> "In addition, in connection with the claims being asserted by Toolco against the additional defendants, you are referred to the motion of the additional defendants, returnable February 18, for an order dismissing said claims with prejudice and to the letter of Toolco to Judge Metzner and dated February 1, 1963."

Pretrial Hearing, February 6, 1963.

My reference to your letter to Judge Hall and to this communication is in the light of the ruling which I now have made regarding the sufficiency of a complaint and its validity against the attack you have made upon it.

I think, if I read the implications of your letter correctly, that if the Court's determination is final you would not proceed with the deposition in California on February 11th. If that is true, I think that it would be better for all people concerned, considering all the time and effort necessary to move the proceedings to Los Angeles, to indicate that as quickly as possible, so that arrangements which are now in progress are not carried forward at [24855] great expense to yourself, to the plaintiff, to the additional defendants, and the inconvenience to the court in Los Angeles which, as I understand it, is proceeding to make the necessary arrangements for this hearing to go forward on February 11th. This is a suggestion which I am making.

Mr. Davis: Your Honor, I am quite aware of that. I do intend and hope, perhaps tomorrow, that I will be in a position of advising all concerned, and particularly Mr. Rankin, to whom I have already pointed out the possibility, and I did expect that I would get some guidance as to what I will have to do next based upon today's ruling or observation that your Honor might make.

I will so advise the parties and try to work out an appropriate procedure so as to put the position of the Tool Company on the record.

Your Honor, I am wondering if it would be appropriate for me to make another suggestion or request, if I may.

In connection with the denial of our motion to dismiss and the time which I now have to apply to the Court of Appeals for whatever relief I can have, and more particularly in view of what I [24856] understand by your Honor's ruling denying the certification under 1292—I also understood that the reasons or the opinion of the Court in reach-

ing that conclusion will not be available to me for another day or two—I was wondering what I would have to present to the Court of Appeals as the basis of the Court's ruling on the one hand and my position on the other.

The Court: It is complicated. I must formalize my ruling and give you the reasons for it. But the two grounds which you are urging are fairly simple grounds.

I think you have set forth in your brief and in your reply brief—and I must say better in your reply brief than in your original brief—your position. I would assume that if you do not have a copy of my opinion by noon on Friday—and I will make every effort to see that you get it; I will have my secretary down tonight and tomorrow night to get it out—even absent the formal reasons, the answer is I do not agree with you.

Mr. Davis: I know I can say that to the Court of Appeals, but in order—

The Court: I will make every effort to [24857] have it before you—it is not going to be too long and will probably run about 15 pages—but I think if you were to go to the Court of Appeals and, if it is necessary, say to them, "Judge Metzner disagreed with this position that I took on my briefs," it would suffice, because all I had before me were the briefs. I ruled upon the briefs and the complaint.

Mr. Davis: That is correct, your Honor. But obviously, and particularly in view of your ruling refusing certification of 1292, I was thinking that the Court of Appeals might like to know what the legal issue—

The Court: I think I flatly can say that I disagree with your interpretation of 408 and 414 as applicable to the specific orders involved here upon which you rely, the orders of 1944 and 1950. The scope of the order goes to the fact of acquisition, as I see it. It does not give you a license to engage in subsequent acts which may amount to restraint of trade or attempts to monopolize, and I do not

think the words in 414 are necessary to carry out what was authorized or approved by the Board encompassing such activity. That in [24858] brief is what the 15 pages are going to say.

Mr. Davis: Do I also understand that it is the conclusion of the Court that—

The Court: Let us leave it this way. You will have an opinion signed by 10 o'clock Friday morning.

Mr. Davis: Thank you, your Honor. I would prefer a stay for a couple of more days.

The Court: I can go on, but you may say what I said from the bench is not what I put in the opinion. I will go over the draft and polish it up.

Mr. Davis: I was really hoping for a little more time beyond Friday.

The Court: I am afraid not.

Mr. Hupper: Your Honor, if I may indulge the Court for a minute, my name is John Hupper and I appear here in the absence of Mr. Bromley, who unavoidably is out West today. I won't say exactly where.

In connection with a paper that was served upon us around noon today involving an application for a stay of any further proceedings in this case, on behalf of the additional defendants [24859] on the counterclaim by reason of a so-called complaint which has been filed today with the CAB, if I may say so, and I think I speak for all the additional defendants, our plans for California are well advanced. Many of our files are there and some of our people.

We believe it is very important to have a quick disposition of this application for a stay, which, as we view it, is simply another diversionary effort in some manner or other to avoid the deposition of Mr. Hughes.

Mr. Davis, in his notice, states that he is bringing on this motion on February 8th, or such other time as the Court may direct. We respectfully urge your Honor to hear Mr.

Davis on this motion now so that we will know where we stand at the earliest possible moment.

The Court: I can listen to him. Does that mean I have to decide it too?

Mr. Hupper: We believe this motion to be just a —

The Court: I have read the complaint which Mr. Davis served upon you. He filed a copy with the Court. I read it this afternoon.

[24860] Would you say, Mr. Davis, in view of the determination of your motion on the complaint, that this motion which you served today, returnable at 4 o'clock Friday, need not be heard at 4 o'clock on Friday?

Mr. Davis: Need not be heard, your Honor?

Well, your Honor, it may very well be that the reasoning that the Court will give in its opinion will cover this also. However, based only upon what your Honor has indicated today, which, if I understand the remarks which obviously—

The Court: Which you are not going to hold against me.

Mr. Davis: Which I won't hold against anyone—indicate the views of the Court as to whether or not the orders obtained from the CAB covered the course of conduct alleged in the complaint.

We have, as your Honor is aware, a second independent ground on which we claim that this primary jurisdiction is in CAB based upon a Supreme Court decision in Panagra, and that is whether the CAB had the power to approve.

To the extent to which your Honor, in [24861] denying my motion to dismiss, addressed himself also to that question—and I recognize that inferentially, but I would like to have it for the record— you would be denying the basis upon which I claim that I would be precluded from pursuing the counterclaim in this court on the ground—

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The Court: You wrote to me, as I recall several days ago—and I think I have those papers right here; your letter of February 1st, that was last Friday—in which you gave me the impression that the reason you were going to move before the CAB and for a stay in this court with regard to the counterclaim was that, if the motion to dismiss had been granted, there would still be outstanding the counterclaims upon which the plaintiff and the additional defendants could proceed with depositions and, since you felt that those counterclaims dealt with the primary jurisdiction of the Board, if they were the only things left in the lawsuit at this time you were then going to move, with regard to the counterclaims, to remove them from the case and remove them as a possible basis for the deposition of Mr. Hughes on February 11th.

In view of the fact, however, that I [24862] have found that your motion to dismiss the complaint should be denied, I was wondering whether the reason for this last procedural step existed any longer.

Mr. Davis: It still exists to this extent. It is quite true that in my February 1st letter I was addressing myself to the situation which would exist if the complaint was dismissed and we had the counterclaims and what the basis of jurisdiction of the court was on the counterclaims absent the existence of the complaint.

Quite frankly I do not know the answer and I have not had an opportunity to research the question as to what is procedurally the question if you assume a complaint as being validly before the Court and a counterclaim as to which primary jurisdiction rests in the Board.

Assume it is a compulsory counterclaim or not a compulsory one and then the question—

The Court: You think they are compulsory counterclaims, don't you?

Mr. Davis: Certainly some of them are.

Pretrial Hearing, February 6, 1963.

The Court: Miss Lea argued that a year or so ago.

Mr. Davis: They are certainly com- [24863] pulsory [or] permissive.

My problem, and the reason for the answer I am now giving you as to whether or not there is any question left, is that I believe there is a question left, although to be sure to the extent to which the Court is predicating denial of our motion to dismiss merely on the fact that 408 does not grant exemption of 414, that has nothing to do with the counterclaim because we do not claim that there were any 408 orders granting exemption of 414.

We do recognize, and our position has to be consistent, and is, we read the Panagra case, there is primary jurisdiction of CAB if the course of conduct alleged is one that the CAB could approve. Whether it did or not is besides the point. Whether it could approve under 408, that is the point.

Whatever the Court may do here, we are proceeding before the CAB for a determination by the CAB as to whether or not the course of conduct there involved—by "their [sic] involved" I mean the counterclaim—is something that they will find to be either in the public interest or not in the public interest.

Our view of the case, that is, the pre- [24864] requisite before we could recover anything in our counterclaim, if I could rely on the ultimate conclusion of the Court that that is not so—and I have not even heard it today, but I assume your Honor will cover that aspect of the matter in your opinion—as I say, it may very well be that, as far as a need of argument or an extended argument or briefing on this question, it will be unnecessary in the light of whatever opinion the Court hands down in connection with the ruling made today, but so far as Toolco is concerned we most sincerely believe that the only proper interpretation is the Supreme Court direction in the Panagra case, because

that was in fact the question before the court in the Panagra case, squarely before the court.

There was a situation where something had not been submitted to the CAB for approval. The CAB unquestionably had not issued any orders and the CAB had to act under 411, which was not involved in 414. Yet the Supreme Court dismissed the complaint because you must go to CAB first and let the CAB decide. . .

Presumably if the CAB—and I am talking about the Panagra situation now—were to [24865] decide that the manner in which Pan American and Grace were exercising control over Panagra was not in the public interest and they refused to bless it or sanction it or however it is done, then presumably whoever had an interest in the situation could resume litigation in the court on the basis of violation of the antitrust laws.

That, of course, was the second independent ground upon which we predicated our motion to dismiss. We were not relying exclusively on the existence of 408 orders.

The Court: Obviously.

Mr. Davis: To answer the suggestion of your Honor, we do—of course, if the complaint is to continue to be litigated, we are not asking to be stayed in our counterclaims, and that is something I will have to think through between now and Friday.

As far as our pursuing our procedure before the CAB, we do not think we have any choice on that.

The Court: Well, I don't know what I can do about your motion. You have noticed it at least for Friday at 4 o'clock. I am in the [24866] ninth week of this criminal trial so I am tied up from 10 until 5 every day, except this afternoon, when we had this lucky break.

If you want your decision out on your motion to dismiss to show the Court of Appeals what I said, it is physically impossible to take this up.

Mr. Davis: I appreciate that.

May I suggest that the matter be left in abeyance, but tomorrow I will make an effort to also make a decision and take whatever action I am advised to take—either tomorrow or Friday—but I will advise the parties wtih respect to this Los Angeles date so that—

The Court: May I take your motion and hold it in abeyance and have argument on it?

Mr. Davis: Any time convenient to your Honor.

The Court: Mr. Hupper is not satisfied.

Mr. Hupper: Isn't it perfectly plain what Mr. Davis is trying to do here? He is going to have a decision some time Friday from the Court [24867] of Appeals on whether or not there is any merit to his attempt to get appellate review. At that point he will have something else which he can wave in front of you or some other court which he will use as a basis for arguing that the deposition of Hughes should not go ahead on Monday. There are still unresolved questions—

The Court: Will you agree, Mr. Hupper, if the Court of Appeals stays my determination, that you are not going to run out to Los Angeles Monday?

Mr. Hupper: I would not agree to that as a matter of law for this reason: The charges made against us in this CAB proceeding are quite entirely different than the charges made by the TWA people against the Tool Company completely. We have an additional question here which is a matter of discretion.

We have, for over a year or almost a year now, been engaged in this case, brought in by Toolco against our will, the Tool Company asserting claims of over $330 million against us and alleging that this court had jurisdiction over those counterclaims, and we have—

The Court: Mr. Davis said Panagra did [24867A] not come down until—

Mr. Hupper: That is not applicable here at all. That involved Section 411.

The Court: I read it four times. Don't tell me that.

Mr. Hupper: It has not the slightest thing to do with this. We are not air carriers and we are not engaged in air transportation. It has nothing to do with this case. There is not a possible basis for it.

What Mr. Davis is doing here is using this motion as a basis after a year of dragging us down the garden path and making us spend hundreds of thousands as a last ditch attempt to stave off the deposition of Hughes.

We have a right to examine Mr. Hughes independently of whatever his position in that complaint is. As a matter of discretion we feel you ought to permit us to go forward on that examination if only for the fact that it would enable us perhaps to adduce facts which would be helpful to you in determining whether or not you have jurisdiction over the subject matter.

The Court: Mr. Davis, do you intend to [24868] pursue your counterclaims?

Mr. Davis: Not until we have a determination from the CAB.

The Court: In other words, you want to stay any proceedings regarding the counterclaims in this court until the CAB has spoken first?

Mr. Davis: That is our understanding of what the Supreme Court has held.

Of course, if I am told in some final manner that I am wrong in that regard, I want to be able to resume. That is our understanding of the Panagra case. It is a basis for our motion to dismiss. It will be the basis on which we will try to obtain a review at this time and therefore I don't understand why a defendant is so anxious to be prosecuted if I am willing to stay my claims against the additional defendants. So far as the facts in their petition, they are set forth in these proceedings before the CAB.

I fail to understand evefy time being accused of following some procedure for some improper motive. What is the motive of the additional defendants in feeling that they want to examine Mr. Hughes to defend themselves and I am permitted to [24869] keep their claim in abeyance until the CAB can make a ruling? Perhaps Mr. Hupper can explain it more clearly.

The Court: We will have to take Mr. Stewart first. This is his chance to be not the last man.

Mr. Stewart: Mr. Davis, as far as the additional defendant Dillon Read is concerned, for the first time in this case, after having been in it for a year, we have the opportunity presumably to prove that the counterclaims which are brought against us are absolutely baseless. It is particularly compelling because this so-called complaint which Mr. Davis has brought before the CAB is absolutely meaningless as far as we are concerned.

Dillon Read is not an air carrier; it is not engaged in a phase of aeronautics, nor does he claim that we are so engaged. Nothing that the CAB says or does not say can affect us in any way.

We have no interlocking directorates and nobody in Dillon Read is on the board of Pan American or TWA or the Metropolitan or the Equitable. There is no possible way in which we can come into Section 411, which deals with unfair competition among air [24870] carriers. Nothing that the CAB decides in this complaint can affect us in any way.

For the first time in this litigation we have come close to being able to prove there is nothing to the charges in his counterclaim, and I suggest it is absurd for him to want to stay on the counterclaims he brought, bringing us into this action, at this particular juncture. I ask your Honor to deny it from the bench.

The Court: There are other problems in the CAB proceeding, are there not, Mr. Davis? You allege that Pan

American World Airways and Mr. Juan Trippe were also co-conspirators during this whole time with the additional defendants named in your counterclaim.

Mr. Davis: There is no question, your Honor. Subsequent to the filing of our counterclaims I discovered additional facts which I am bringing to the attention of the CAB.

There is no question, however, that the course of conduct involved, which is a matter of concern, primary concern, to the CAB, is the same whether or not the additional defendants are limited or expanded by one more or less. The question [24871] basically is whether or not the CAB —for all I know, although I don't believe so, the CAB may approve this interlocking relationship between Metropolitan and Pan American. That is where we get into the question of where I am disagreeing with your conclusions.

It is clear to me, as the Supreme Court said, we are in a peculiar situation if on the one hand the Court were to entertain whether or not a course of conduct was or was not in violation of the antitrust laws and then the CAB should turn around and approve it and specifically grant exemption under 414, even though they never did it before.

The Court: Is the issue of whether any of the parties named in the complaint before the CAB are engaged in a phase of aeronautics a question for the CAB or for the Court under the counterclaim?

Mr. Davis: We allege and claim that they are engaged in a phase of aeronautics. The CAB has any number of decisions as to what they claim is a phase of aeronautics. I believe it is a question for the CAB to determine, subject to judicial review by the Court of Appeals.

There is no question; the Act uses a [24872] phrase "a phase of aeronautics," and there again we come to the question as to how we construe the Supreme Court direction or mandate which said the Act must be construed broadly and

must be intended to empower the Board to correct the evils inherent in whatever it deals with.

There is no question but by 409, interlocking directorate relationship, and there is no question under 408, the Congress intended that agency to control and regulate the relationship between a person engaged in "a phase of aeronautics" and an air carrier and transactions between them and what they do to each other.

You emasculate 408 if some independent such as the Court is going to define what a phase of aeronautics is or is not. There is no question of judicial review as to what the Board may determine. I don't have any question in my mind. I may be in the minority here today, but it is at least the primary jurisdiction, the expertise of the CAB, to determine in the first instance what they regard as a phase of aeronautics.

I know that throughout the years since the Act was passed a great many people have argued [24873] before the CAB that the kind of activities they were engaged in were not the manufacture of aircraft or parts of aircraft and therefore outside of the control of the CAB, and therefore they could do what they wanted to do, and CAB has rejected those arguments on a number of occasions and has developed CAB law as to what they claim constitutes a phase of aeronautics. That is unquestionably involved here.

Go back to reasons why I did what I have done and how things change. There is no question in my mind that the Panagra decision of the Supreme Court expanded what I was contending for prior to the Panagra decision.

If your Honor will recall I was accepting the decision of Judge Murphy in the Panagra case where he had excluded from the jurisdiction of the Court that area which had been covered by orders of the CAB, leaving to the CAB to interpret its own orders as to whether or not it did cover the conduct that was alleged.

Pretrial Hearing, February 6, 1963.

The Court: He only went ahead, as I understand it, on the charge that Pan American had prevented Panagra from applying for additional routes [24874] from the Canal Zone to the United States.

Mr. Davis: That's correct. Before Judge Murphy the contention—there were two aspects of the claim. One was that one which was predicated upon an agreement between Grace and Pan American entered into before the Civil Aeronautics Act was adopted and therefore protected by the grandfather concept, and there were alleged violations of the antitrust laws by reason of the fact that control had been exercised over the air carrier in the use of ticket offices and some other things which were subject to orders of the CAB.

In our earlier brief back in August of 1961, I think it was, I was arguing that Judge Murphy had recognized the primary jurisdiction of CAB, leaving to the CAB the interpretation of its own orders as to what it was approving or not approving, because the CAB had acted in that area but assumed jurisdiction in the area they had not acted and at that time believed it could not act, namely, this exercise of control over Panagra and how the routes were being divided.

The Supreme Court came down and said that even in the area in which the CAB had not acted [24875] and in fact an area which the CAB did not believe it could act, nonetheless it said, " We are going to construe the Act so broadly as to infer a power in CAB to do something about this kind of exercise of control," dismissed the complaint, and this was a matter that CAB should act in.

That does not mean necessarily there has not been a violation of antitrust laws and after the CAB has acted and has found or failed to find it is in the public interest, thereafter if someone violated the antitrust laws they will be subject to whatever remedies the antitrust laws provide.

It is our view of the matter that until that determination is made for the reason given by the Supreme Court, it would be odd indeed if a course of conduct which could be approved by CAB under 408 could run afoul of the antitrust laws.

So our position was not— that is what I meant in my opening remarks—I was not relying as a matter of fact on what CAB had or had not obtained but only on a recognition that the authority might be in the CAB to act on it. Tomorrow they may say that the way you exercised control over it was in the public interest and we approve [24876] it. That would preclude the enforcement of antitrust violations and therefore we believe that should be determined first.

The Supreme Court said that if you are claiming damages, there is no question the CAB cannot grant you relief for damages, in that footnote in the court decision referring to the Hewitt decision; that in that situation you ought to get a determination of the violation of the law with the possibility you have a remedy of the antitrust laws and go to the court and collect your damages.

The Court: Mr. Hupper, I am sorry, I am not in a physical condition to comply with your request. I am going upstairs now to get this opinion out. I am on trial all day tomorrow. I may have to work on the opinion again tomorrow night. I hope not.

Mr. Hupper: May I express my hope, your Honor, that the argument is not set down on the motion for a stay so as to interfere with our examination of Mr. Hughes starting Monday.

The reason I say that is that we believe very firmly that we have an independent right to examine him quite apart from what happens to Mr. [24877] Sonnett. We intend to vindicate—

The Court: What do you think of Mr. Davis' argument that I don't have jurisdiction on the counterclaim as opposed to the complaint?

Mr. Hupper: I am not sure I understand what his position is, but I do—

The Court: This is very simple. He is going to take you down to Washington.

Mr. Hupper: I think the very simple reference to these counterclaims will show you how completely different they are from the claims made in the complaint. The first counterclaim—

The Court: I know.

Mr. Hupper: The only reference that has anything to do with CAB is the second counterclaim. All the others are completely different. I want to join very wholeheartedly in what Mr. Stewart said about the time and expense that we have to go through in trying to get our first witness on the stand after we had to sit through the other deposition for a year. We want to proceed with this case and prove that there is absolutely no merit to these claims against us.

The Court: Well, all I have before [24878] me is a motion returnable on Friday for a stay of the discovery proceedings. I am telling you [I] can't hear you on Friday. It would be impossible. I will try some time tomorrow to read the complaint filed with the CAB with greater particularity than I remember it this afternoon and try to match them up.

Mr. Hupper: Do you suppose we could set it for the 18th, which is the return date for our motion to dismiss the counterclaim?

The Court: It is all right with me.

Mr. Hupper: That's all right with us.

The Court: The 18th? That is a Monday? Certainly. Does that dispose of it?

Mr. Hupper: I guess it does. I wish we could have heard and disposed of it right away. I know your problems.

The Court: I don't see how I could possibly do it.

Pretrial Hearing, February 6, 1963.

Mr. Hupper: There is a minor thing. You did stay, as far as the TWA people were concerned, all further discovery production until 5 o'clock tomorrow.

The Court: I will put in the additional [24879] defendants too.

Mr. Hupper: The situation is different, Judge—

The Court: Let us not argue with the stay. It extends to all the additional defendants.

Mr. Hupper: Thank you.

Mr. Sonnett: Thirty seconds, your Honor, by way of a report. I don't want to get mixed up with this other question except to say the so-called derivative counterclaim, counterclaim 3, by no legerdermain of Mr. Davis or anybody else can possibly have anything to do with the CAB, and on behalf of TWA I have a very definite interest in that counterclaim. While Mr. Davis is deciding what he means when he says they may elect in effect to cop a plea, he better realize there are derivative counterclaims asserted by him, and for him to stand up and say "We default" is not going, in the judgment of TWA, to dispose of this case, if that is the way he thinks he can dispose of it; it won't meet the problem.

The other thing is a report. I would like to file with the Court an affidavit by one of [24880] my associates and serve a copy on Mr. Davis because this relates to the additional contempt committed and fully ripened prior to 5 o'clock today arising out of their failure to comply in any respect with your order to make a day-to-day production of so-called tax documents.

Yesterday I wrote them and asked that they produce prior to 5 o'clock today, pursuant to your order, 1961 financial statements and tax returns, and the same for 1962, on the theory they could get those in five minutes. They have declined to do so. This affidavit is an affidavit that we asked for them at 5 today and they refused to do it.

The Court: All right. Thank you, gentlemen.

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Opinion and Order, February 7, 1963.

[3830]

[CAPTION] 61 Civ. 2324

[3831]

METZNER, District Judge.

Defendant Hughes Tool Company (Toolco) moves to dismiss the complaint pursuant to rules 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state any claim upon which relief can be granted. The original notice of motion was filed on August 9th, 1961 and in addition to the grounds now urged requested summary judgment pursuant to rule 56 of the Federal Rules of Civil Procedure. In effect, the present notice of motion brings on for hearing the original motion.

In its brief Toolco has stated,

> "At the suggestion of the Court (Transcript of pre-trial conference of September 6, 1961, pp. 50, 52) Toolco agreed to postpone the motions and thereafter commenced its pre-trial examination of TWA."

The opinion of this court of January 19th, 1963 sets forth the numerous occasions on which counsel for Toolco agreed that the motion as originally filed was not ripe for determination. Consequently, it was not a suggestion of the court, to which Toolco courteously agreed, that the matter be postponed. Rather it was an understanding [3832] by counsel that under the decisions of this circuit summary judgment in this type of case should not be considered until the deposition proceedings are completed. (See also *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 [82 S. Ct. 486, 7 L.Ed. 2d 458] (1962)). The grounds now urged

under rule 12(b) existed and were adverted to in the original notice of motion. Since counsel for Toolco has indicated he was prepared at that time to argue the matter, he could just as well have submitted it then, instead of requesting on January 14th, 1963 that the motion now be heard, when the taking of the deposition of Howard R. Hughes is imminent. Furthermore, the Special Master on October 25th, 1962 granted the second adjournment of this deposition, from October 29th to February 11th, 1963, and stated that the long adjournment of more than three months was in order to allow Toolco's counsel sufficient time to make whatever motions he thought were necessary.

On January 14th, 1963, when Toolco moved that its motion to dismiss be set down for hearing, it also requested that TWA first proceed by written interrogatories directed to Hughes, instead of by oral deposition. [3833] This request was formally denied on January 19th, 1963, after a pretrial conference held on January 17th.

Counsel for Toolco continually relates the taking of the deposition to a determination of the motion to dismiss. As I have indicated before, this deposition depends not only on the existence of alleged valid claims against Toolco, but on Toolco's counterclaims for $385,000,000 against plaintiff and the additional defendants.[1]

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[1] On the morning of the argument of this motion (February 6th, 1963) Toolco filed another notice of motion returnable February 8th, 1963 requesting that all further proceedings with respect to the counterclaims be stayed pending a disposition by the Civil Aeronautics Boa. l of a "Complaint of Hughes Tool Company and Request for Investigation" which had been filed that day with the CAB. The only document attached to the notice of motion is a copy of the complaint filed with the CAB, seeking relief under sections 408, 409, 411 and 1002 of the Federal Aviation Act. That complaint names all of the additional defendants in the action pending in this court and also Pan American World Airways, Inc. and Juan T. Trippe. It sets forth some of the allegations contained in the counterclaims and also makes reference to the proposed merger of TWA and Pan Am. It further alleges that Trippe, the dominant force in Pan Am, also has been in the position to influence the policies of Metropolitan Life Insurance Company, a large lender to TWA and one of the additional defendants in this action. Thus, the conspiracy alleged in the counterclaims has been enlarged by including Pan Am and Trippe. Jurisdiction of the CAB is predicated upon a claim that the decision in *Pan American World Airways, Inc.* v. *United States*, 31 U. S. L. Week 4124 (U. S. Jan. 14, 1963) (Nos. 23, 47) [371 U. S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325], grants the CAB primary jurisdiction.

[3834] So much for the underbrush. Now as to the merits of the motion, there is no doubt that the complaint on its face sets forth a claim against the defendant and is not subject to dismissal under rule 12(b) (6).

Briefly, the plaintiff, TWA, charges that Toolco, Hughes, and Holliday, named defendants, and Atlas Corporation have combined and conspired to restrain, and have attempted to monopolize, interstate and foreign commerce of the United States in the furnishing of jet aircraft and or nonjet aircraft by sale, lease or other means, to TWA, and to TWA and other air carriers, in violation of sections 1 and 2 of the Sherman Act and sections 3 and 7 of the Clayton Act. It more specifically alleges that the defendants and Atlas combined to restrain commerce by providing financing of the acquisition by TWA of aircraft only upon the condition that TWA acquire all such aircraft from Toolco, and that they required TWA to boycott all suppliers of aircraft except Toolco, in violation of section 1 of the Sherman Act; and that sales and leases of jet-powered aircraft were made on the condition that the purchaser or lessee would not buy or lease the goods of a competitor of the vendor or lessor, in [3835] violation of section 3 of the Clayton Act. The complaint also charges that acquisitions of the stock of a corporation were made in violation of section 7 of the Clayton Act.

The first claim is concerned with acts allegedly committed during and prior to December 1960 which, it is claimed, violate all of the above mentioned statutes. The second claim deals with events occurring subsequent to December 1960 which are alleged to violate sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. For these claims, plaintiff seeks treble damages, divestiture, and an injunction. The third claim charges that the defendants have wilfully and maliciously damaged the business of TWA by the acts alleged in the prior claims, and seeks damages and an injunction under the common law.

Defendant Toolco urges that the complaint be dismissed because the control by Toolco over the plaintiff was authorized by the CAB and was thereby exempted from the antitrust laws. The other ground urged is that the subject matter of the complaint is within the exclusive primary jurisdiction of the CAB.

[3836] Toolco indicates that it has withdrawn its motion for summary judgment. However, its brief relies on matter outside the complaint to justify dismissal on the ground that the acts done by Toolco were pursuant to the exercise of control over TWA authorized by the CAB and therefore exempt from the antitrust laws. Dismissal under rule 12 (b) (6) is not warranted, though summary judgment might be available. *Putnam* v. *Air Transport Ass'n of America*, 112 F. Supp. 885 (S.D.N.Y. 1953). The defendant appears to be in a procedural dilemma. Since defendant has raised the issue of exemption in its third affirmative defense, the court will consider this branch of the motion as one for judgment on the pleadings pursuant to rule 12(c). Matters dehors the complaint may be considered on the branch of the motion seeking dismissal for lack of subject matter jurisdiction. *Cohen* v. *American Window Glass Co.*, 126 F. 2d 111, 114 (2d Cir., 1942); *Central Mexican Light & Power Co.* v. *Munch*, 116 F. 2d 75 (2d Cir., 1940); *Moore* v. *Garman*, 75 F. Supp. 453 (S.D.N.Y. 1948).

Toolco relies on the 1944 and 1950 orders of the CAB permitting Toolco to acquire control of TWA. 6 CAB 153; 12 CAB 192. These orders were issued pursuant [3837] to section 408(5) of the Civil Aeronautics Act of 1938,[5] which makes it unlawful without CAB approval for "any person engaged in any other phase of aeronautics to acquire control of any air carrier in any manner whatsoever". Toolco

[5] This section is now 49 U.S.C. § 1378 (5). The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301 et seq., superseded the Civil Aeronautics Act of 1938, 52 Stat. 973, making no changes relevant to the problem before the court.

was considered as one engaged in a phase of aeronautics because of its activities in the development of aircraft and accessories.

Section 414 of the Federal Aviation Act, 49 U.S.C. § 1384, provides that

> "Any person affected by any order made under sections 408 [49 U.S.C. § 1378] * * * shall be, and is hereby, relieved from the operations of the 'antitrust laws' * * * and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

It is Toolco's contention that all the acts complained of by TWA are immunized from claims of violations of the antitrust laws because of section 414. [3838] This leads to an examination of what action was approved by the orders issued pursuant to section 408(5) and what is the scope of the exemption provided by the words "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order", in section 414.

Statutory authority granted regulatory agencies to give exemption from the application of the antitrust laws is not unusual.[3] But the Supreme Court has clearly stated that immunity from the antitrust laws is not to be lightly implied. *California* v. *Federal Power Comm'n*, 369 U. S. 482, 485 [82 S.Ct. 901, 8 L.Ed. 2d 54] (1962). Regulated indus-

[3] See, e. g., 47 U.S.C. § 222(b) (1) (telegraph mergers approved by the Federal Communications Commission); 47 U.S.C. § 221(a) (telephone mergers approved by FCC); 46 U.S.C. § 814 (rate fixing and other agreements between water carriers approved by the Federal Maritime Board); 49 U.S.C. § 5 (railroad mergers approved by the Interstate Commerce Commission); 49 U.S.C. §§ 5a-b (agreements between carriers involving rates approved by ICC); 15 U.S.C. § 18 (exempting from the operation of section 7 of the Clayton Act transactions approved within their statutory authority by the CAB, FCC, Federal Power Commission, ICC, FMB, Secretary of Agriculture, and, in some cases, the Securities and Exchange Commission).

tries are not per se exempt [3839] from the antitrust laws. *United States* v. *Borden Co.*, 308 U.S. 188, 198-199 [60 S.Ct. 182, 84 L.Ed. 181.] And it is elementary that repeals by implication are not favored. *Georgia* v *Pennsylvania R. R.*, 324 U.S. 439, 456 [65 S. Ct. 716, 89 L.Ed. 1051] (1945). In the latest decision by the Supreme Court, *Pan American World Airways, Inc.* v *United States, supra* note 1, which will be discussed in detail below, the Court stated that the regulatory scheme here in question would not be read as designed completely to displace the antitrust laws "absent an unequivocally declared congressional purpose so to do." 31 U. S. L. Week. at 4126. [371 U. S. at 305, 83 S. Ct. at 482]. It went on to say that the antitrust problems "expressly entrusted to [the CAB] encompass only a fraction of the total." *Ibid.*

The orders of 1944 and 1950 relied on by Toolco merely approved the acquisition of control of TWA by Toolco. The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibted by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and protected by the exemption provided [3840] by section 414. *Cf. United States* v. *Southern Pac. Co.*, 290 Fed. 443 (D.Utah 1923). These orders did not give Toolco a license to engage in other acts that normally may be forbidden by the antitrust laws. What has been approved and exempted is the fact of "acquisition of control" not activities engaged in by the controlling party subsequent to acquisition, which may be illegal.

I have found no case and none has been cited to me which interprets the words "necessary to enable such person to do anything authorized, approved, or required by such

order", or similar exemptive language in other statutes, in a way that will sustain Toolco's position. In *Putnam* v. *Air Transport Ass'n of America, supra,* the plaintiff was attacking a claimed boycott by the defendants. The court in applying section 414 stated that the boycott was "the inevitable result" of the agreement sanctioned by the CAB which by its terms permitted the defendants to choose with whom they would deal. This is far different from the immunization clamed by Tooleo. Congress could not have intended that restraints or attempts to monopolize, subsequent to an order allowing acquisition of control, were necessary to enable Toolco to do anything authorized or approved by the order.

[3841] One more point merits discussion under this branch of the motion. The second claim for relief is based on acts alleged to have been committed by the defendants and Atlas subsequent to December 1960. In December 1960 TWA moved before the CAB for modification of the original order of 1944 as amended. Approval was also sought

> "under section 408 * * * for the transactions contemplated under the financing plan. Similarly sought is approval * * * under section 409 of the Act, of the interlocking relationships arising out of the designation of Raymond M. Holliday, as a representative of Toolco, and of Ernest R. Breech and Irving S. Olds as representatives of the banks and institutional investors, to serve as Voting Trustees under a Voting Trust set up for the Toolco-TWA stock."

This relief was requested in connection with the jet aircraft financing transactions which resulted in Toolco's putting its 78% stock interest in TWA under a voting trust, which in effect gave control of TWA to the lenders who are named as additional defendants in this action.

Opinion and Order, February 7, 1963.

On December 29th, 1960 the CAB entered its order on this motion (Order No. E-16195). In the course of the opinion, the CAB said at page 6:

> [3842] "Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention.
>
> "In short, and without further description of these problems, the Board wishes to make clear the fact that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA.[19] It is clear that such approval would not be forthcoming without a searching inquiry into the public interest factors affecting this control.[20] "

Footnote 19 in the above quotation reads as follows:

> "The Option Agreement requires Toolco, in exercising the option, to provide a satisfactory opinion of counsel that the exercise of the option, by purchase of the notes, does not require governmental or regulatory approval or that such approval has been granted and is in force. No such provision could, of course, preclude dissolution of the voting trust after the ten-year term has expired. Nonetheless, it is clear that Toolco should not resume direct control at that time unless prior approval of the Board is sought and obtained."

It is clear from this opinion that the CAB does not look upon Toolco as controlling TWA after December 1960.

Thus, anything done by Toolco subsequent to that date has not been approved by orders of the CAB and certainly no exemption exists as to the second claim.

[3843] We come now to the question of "primary jurisdiction" which is defendant's second ground for dismissal of these claims. In discussing the primary jurisdiction of the CAB in relation to this complaint, there is some overlap with the discussion as to the effect of an order issued under section 408(5) and the extent of the exemption granted by section 414. In this case we are concerned primarily with whether there exists exclusive primary jurisdiction in the CAB without regard to whether or not it has taken any action in relation to a particular transaction. *Cf. Far East Conference* v *United States*, 342 U.S. 570 [72 S.Ct. 492, 96 L.Ed. 576] (1952).

Defendant places great reliance upon the recent decision of the Supreme Court in *Pan American World Airways, Inc.* v *United States, supra*, popularly known as the *Panagra* case. In determining the scope of this decision we must first go to the next to the last sentence of the majority opinion, which reads:

> "We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed." 31 U. S. L. Week. at 4129 [371 U.S. at 313, 83 S.Ct. at 486].

[3844] The Court was dealing with section 411 of the act, 49 U.S.C. § 1381, which gives the CAB jurisdiction over "unfair or deceptive practices" and "unfair methods of competition" by air carriers. The acts charged to be antitrust violations were limitations of routes, divisions of territories, and the relation of a common carrier to air carriers, which the Court stated were "precise ingredients of the Board's authority in granting, qualifying, or deny-

ing certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." 31 U. S. L. Week at 4126 [371 U.S. at 305, 83 S.Ct. at 482]. The Court went on to say:

> "It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review * * *." 31 U. S. L. Week at 4127 [371 U.S. at 309, 83 S.Ct. at 484].

If we substitute in this quotation the words "acquisition of control of any air carrier by any person engaged in [3845] any other phase of aeronautics" in place of "an affiliation between a common carrier and an air carrier", we have presented the fact situation upon which Toolco relies. However, the acts complained of by TWA are acts allegedly done by the controlling party after the acquisition had been approved, not only to the detriment of the carrier in question, but to other carriers and to competitors of the controlling party. This in my view is the distinguishing factor between this case and the *Panagra* case. While the acts charged here could be proper subjects for consideration by the Board in determining whether control of TWA by Toolco was in the public interest,[4] they are not the type

[4] See CAB Order No. E-16195 quoted at page 13 [p. A125] *supra*. [214 F. Supp. at 110-11]

of acts over which the Board has exclusive primary jurisdiction. They are not within the contemplation of the regulatory powers granted the CAB. *Cf. Georgia* v *Pennsylvania R. R., supra.*

Furthermore, the Board has no power to award damages, and we do not reach the statement of the Court in the *Panagra* case to the effect that since the Board's [3846] essential regulatory powers deal with the division of territories, etc., then Congress must have intended to give it authority that was ample to deal with the evil at hand. Rather, the statement by the Court that a court has jurisdiction under the antitrust laws if the agency has no power to grant relief is controlling here. 31 U. S. L. Week at 4128 n. 19. [371 U.S. at 313 n. 19, 83 S.Ct. at 486 n. 19].

It is also clear that once a regulatory agency has acted the court is competent to consider and determine the scope of the exemption claimed. *River Plate & Brazil Conferences* v *Pressed Steel Car Co.*, 227 F.2d 60 (2d Cir., 1955); *Putnam* v *Air Transport Ass'n of America, supra.* The cases of *American Airlines* v *Standard Air Lines*, 80 F. Supp. 135 (S.D.N.Y. 1948) and *United States* v *Railway Express Agency*, 89 F. Supp. 981 (D.Del. 1950), relied on by Toolco, are not in point.

In addition to the determination that as a matter of law the Board does not have exclusive primary jurisdiction over the acts alleged in the complaint, the practical aspects of this case make especially apposite the statement in the *River Plate* case, *supra*, [3847] to the effect that a reference to the agency would be "useless and time-consuming" (227 F.2d at 63). Over 10,000 pages of testimony have already been taken by Toolco in deposition proceedings and over one and a quarter million documents have been produced in these proceedings by all parties. If there is any policy that would favor referral, it is not present in this case. See

Atlantic Coast Line R. R. v *Riss & Co.*, [105 U.S. App. D.C. 380] 267 F.2d 657, 658 (D.C. Cir. 1958).

Consequently, the motion to dismiss is denied. The application made upon oral argument for a certificate pursuant to 28 U.S.C. § 1292(b) was denied at that time. Toolco's application for a stay of all deposition-discovery proceedings pending an application for a stay to the Court of Appeals was granted on the oral argument to the extent that all deposition-discovery proceedings are stayed until 5 p. m. February 8th, 1963 to allow Toolco time to request a stay from the Court of Appeals beyond that time.

[3848] So ordered.

Dated: New York, New York
February 7, 1963

[The above opinion now appears at 214 F. Supp. 106]

The above opinion is filed pursuant to the order of the court entered on February 6th, 1963, which was endorsed on the back of the notice of motion dated January 14, 1963 and which reads as follows:

> "Upon consideration of defendant's brief filed on 2/1/63 in support of the motion to dismiss, the answering brief of plaintiff filed on 2/2/63 in opposition, defendant's reply brief filed at noon today, and the oral argument on said motion, the motion to dismiss is denied. A formal opinion giving the reasons of the court will follow. So ordered.
>
> Feb. 6, 1963 at 6:05 p.m.
>
> /s/ CHARLES M. METZNER
> U. S. D. J.

Toolco's Notice of Position.

[3849]

[CAPTION] 61 Civ. 2324 NOTICE OF POSITION

SIRS:

PLEASE TAKE NOTICE that upon:

(1) the decision of this Court of February 6, 1963 denying Hughes Tool Company's ("Toolco") motion to dismiss the complaint;

(2) the decision of the Court of February 6, 1963 denying the application of Toolco for a determination which would permit a discretionary review at this time by the Court of Appeals pursuant to the provisions of Title 28, U. S. C. § 1292(b);

(3) the enormous expenses which would be incurred by Toolco directly, and indirectly as the 78% owner of plaintiff Trans World Airlines, Inc. ("TWA") in further pre-trial [3850] and trial proceedings and the belief of Toolco that such expenses would exceed the amount of damages provable by plaintiff under the complaint;

(4) the position of Toolco that it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants at this time; and

(5) all proceedings to date;

Toolco hereby elects, subject only to whatever judicial relief it may hereafter obtain, to rest on the merits of its positions as heretofore taken so that it may avoid the

burdens and expenses involved in further pre-trial and t
proceedings prior to the time that an appellate court
the opportunity to rule upon the decisions and ord
heretofore made herein.

Dated: New York, New York
February 8, 1963.

Opinion and Orders, May 3, 1963

[5161]

[CAPTION] 61 Civ. 2324

[5162] METZNER, D. J.:

The plaintiff Trans World Airlines, Inc. (TWA) has moved for an order pursuant to rules 37(b)(2)(iii), 37(d) and 55(b)(2) of the Federal Rules of Civil Procedure directing the entry of a judgment by default against the defendant Hughes Tool Company (Toolco). It requests that a hearing be held to determine the amount of damages to be paid by Toolco for the injuries alleged in the complaint, and that Toolco divest itself of all of [5163] its right, title and interest in the stock of TWA. The motion also seeks leave to increase the *ad damnum* clause following paragraph 70 of the complaint, from $105,000,000 to $135,000,000. It further seeks a dismissal of the counterclaims with prejudice. The motion further requests that Toolco, its officers and employees, or anyone acting in concert with them, be enjoined from instituting any action based upon the counterclaims set forth in the answer of Toolco and from instituting any proceeding before an administrative agency of the United States in which TWA is a party and which is based upon the allegations of the counterclaims. Finally, it is requested that the claims asserted by TWA against the defendant Holliday be severed from these proceedings.

Toolco owns 78% of the stock of TWA and Howard R. Hughes owns all of the stock of Toolco. It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally.

The deposition of Hughes was originally scheduled for September 24th, 1962 and was adjourned by the court to October 29th, 1962. On October 25th [5164] the Special Master

adjourned the deposition of Hughes to February 11th, 1963. On December 28th, 1962 the Special Master stated that when this adjournment was granted there was no doubt that it was the intention and expectation that the deposition would start on the adjourned date and proceed until it was concluded according to law.

In the pretrial order of January 10th, 1963 the court affirmed this ruling of the Special Master, and stated that the date of February 11th, 1963 would be adhered to in the absence of extraordinary circumstances. The order of January 10th also directed Toolco to produce certain documents as to which it claimed an attorney-client privilege. The order pointed out that Toolco's opposition to producing such documents was in fact a reargument of the order of this court dated July 24th, 1962 which denied the claim of privilege.

The order of January 10th also denied Toolco's application to proceed at that time with the examination of two witnesses on the ground that such deposition would interfere with the taking of the Hughes deposition scheduled for February 11th.

[5165] On January 15th counsel for Toolco moved for an order that the Hughes deposition be taken on written interrogatories, or, in the alternative, that the motion to dismiss the complaint, pending since August 9th, 1961, be brought on for hearing. On January 16th Toolco's counsel was informed that he would be given until February 1st to submit all papers in support of his motion to dismiss. On January 19th Toolco's motion to take Hughes' deposition in writing was denied. The court, however, allowed counsel for Toolco time to indicate whether he desired the place of deposition to be changed for the convenience of Hughes. No such request was ever made.

On January 23rd the Court of Appeals denied Toolco's application for a stay of the orders of January 10th and 19th.

On February 1st, on Toolco's appeal from an order of the Special Master, the court affirmed that order, and directed that Toolco produce certain tax documents to TWA on a daily basis up to February 11th.

On February 6th a hearing was held on Toolco's motion to dismiss the complaint. The motion was denied [5166] from the bench with an indication that the formal opinion would be filed the following day. The denial of the motion embraced a finding that the court had jurisdiction of the claims. Toolco was granted a stay of deposition-discovery proceedings until 5 p.m. on February 8th, to afford it an opportunity to apply to the Court of Appeals for a further stay pending an application for a writ of mandamus.

The formal opinion of February 7th, denying Toolco's motion to dismiss the complaint, pointed out that the grounds urged for a dismissal existed and were adverted to in the original notice of motion filed on August 9th, 1961, and served several weeks prior to the assignment of this case for all purposes, pursuant to rule 2. The court indicated that counsel for Toolco could just as well have argued the motion at the inception of the litigation, instead of waiting until the taking of the deposition of Hughes was imminent.

A pretrial conference was held on Friday, February 8th, at 5 p.m., on information that counsel for Toolco was not going to proceed with the deposition [5167] proceedings of Hughes on the following Monday. Toolco did not apply to the Court of Appeals for a stay pending an application for a writ of mandamus, but, rather, submitted a "Notice of Position" to the court at the time of the hearing. In essence, this document stated that because of the enormous expenses that would be incurred in further pretrial and trial proceedings, which in Toolco's belief would exceed the amount of damages provable by TWA under the complaint, Toolco decided to rest on the merits of its position,

so that the Court of Appeals would have an opportunity to rule upon the propriety of the denial of the motion to dismiss the complaint.

At the hearing counsel for Toolco stated that he had advised his client of the sanctions available to TWA under rule 37, and that by insisting upon a right to obtain a review of the legal questions involved in the proceedings to date Toolco understood that it might be deprived of further defending on the merits. Counsel referred to this as a "business decision."

Counsel for Toolco specifically stated that Hughes would not appear for deposition on February 11th [5168] and that if it were necessary to clarify the record everyone could gather on the following Monday (February 11th) to

> "note the fact that the Tool Company is failing in (sic - and?) [sic] refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it."

Counsel also stated that he did not intend to further litigate the counterclaims until after a determination of a complaint filed by Toolco with the Civil Aeronautics Board on February 6th which includes some of the allegations of the counterclaims.

Embraced within the refusal to proceed with the deposition of Hughes is the refusal to obey the orders of the court directing Toolco to produce the documents referred to above.

On the basis of this record TWA made the motion now before the court. It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default

was [5169] deliberate and willful and justifies the court in entering a default judgment as provided in rule 37(b)(2)(iii) and 37(d). A judgment by default shall be entered in favor of TWA against Toolco, and the counterclaims asserted by Toolco against TWA shall be dismissed with prejudice.

That branch of the motion seeking to increase the *ad damnum* clause from $105,000,000 to $135,000,000 is granted. This is not a case where a party has defaulted in appearance. Here issue was joined and adversary proceedings continued in the pretrial stages of this litigation. The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered. Furthermore, Toolco will be represented at the hearings necessary to assess damages under rule 55(b)(2). Rule 54(c); *Peitzman* v. *City of Illmo,* 141 F.2d 956 (8th Cir. 1944); *cert. denied,* 323 U.S. 718 (1944; *cf. Riggs, Ferris & Geer* v. *Lillibridge,* Docket No. 27814, 2d Cir., April 10, 1963.

Before entering the final judgment a hearing must be held to determine the amount of [5170] damages to be awarded TWA since the damages are unliquidated. Therefore, pursuant to rule 55(b)(2), the question of the amount of the damages to be paid by Toolco to TWA is referred to J. Lee Rankin, the Special Master heretofore designated by the court, who has presided over the deposition-discovery proceedings for the past year.

TWA has also requested that Toolco divest itself of its 78% stock interest in TWA. The propriety of granting this prayer for relief will be determined by the court.

The determination of the application by TWA for an injunction will be held in abeyance pending the entry of the final judgment.

The application to sever the action against Holliday has been withdrawn on his election to be individually bound

by the defaults of Toolco. Consequently, the application for a default judgment is deemed to include a request for similar relief against this defendant, and the disposition of this motion as to Toolco is also dispositive as to Holliday.

[5171] I am of the opinion that this order involves a controlling question of law (see *Pan American Airways, Inc.* v. *United States*, 371 U.S. 296 (1963)) as to which there is a substantial ground for difference of opinion. Enormous expense has already been incurred in this litigation, and the hearings before the Special Master on the question of damages, with a potential recovery of $135,000,000 on the first two claims and $10,000,000 on the third claim, may well be prolonged. An immediate appeal from this order is justified, since it may materially advance the ultimate termination of this litigation.

So Ordered.

Dated: New York, New York
May 3, 1963

Charles M. Metzner /s
U. S. D. J.

[The above also appears at 32 F.R.D. 604.]

Order Re Leave To Appeal.

[5407]

[CAPTION]

Application for Leave to Appeal Under Section 1292(b) of Title 28, United States Code.

CHESTER C. DAVIS, New York, N. Y., for defendants Hughes Tool Company and Raymond M. Holliday.

Application to appeal the issues of (1) Whether the U. S. District Court for the Southern District of New York had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the anti-trust claim of plaintiffs [sic], is granted; and in all other respects the application is denied.

Proceedings before the district court or any master appointed to carry forward any proceedings below for the assessment of damages, or otherwise, are ordered stayed pending disposition of this appeal. Judge Friendly took no part in the consideration or the disposition of this application.

S. R. W.
J. J. S.
U. S. C. JJ.

6 June 1963

Pretrial Order, February 7, 1962.

[738]

[CAPTION] 61 Civ. 2324

ORDER

Pretrial conferences were held in this cause on January 10, 1962 and January 23, 1962, wherein the following proceedings were had.

* * *

II.

The deposition of the plaintiff by Charles C. Tillinghast, Jr., shall be continued and the depositions of [739] the other witnesses shall be commenced in accordance with the schedule annexed hereto. The Special Master hereinafter appointed may vary this schedule upon application of either party if in his opinion the circumstances require such variance.

III.

Upon the consent of counsel for the plaintiff and the defendant Hughes Tool Company, the Court was empowered to appoint a Special Master. J. LEE RANKIN, ESQ., of 36 West 44th Street, New York 36, New York, is hereby appointed Special Master to act in connection with the depositions and other discovery proceedings undertaken by any person now a party or any person who may hereinafter become a party, with the following powers: to preside over and supervise the conduct of depositions and in connection therewith to rule on such objections to questions, whether heretofore made or to be made, as have not been reserved by stipulation of the parties to the time of trial; to rule on objections, whether heretofore made or to be made, with

respect to the production of documents; to make any and all other rulings which may be required pursuant to the provisions of Rules 26 to 37, and 45, of the Federal Rules of Civil Procedure and such other rules as may from time to time become applicable.

IV.

Any action taken or ruling made by said Special Master shall be subject to review by the Honorable Charles M. Metzner, United States District Judge for the Southern [740] District of New York, upon timely application with reasonable notice.

V.

The Special Master shall be reimbursed for such expenses as are reasonably and necessarily incurred by him and the compensation of the Special Master is to be fixed at $60.00 per hour. Such reimbursement and compensation are to be taxed as costs at the conclusion of this action; provided, however, that until the taxation of costs the compensation of the Special Master is to be paid at monthly intervals, fifty per cent (50%) by plaintiff Trans World Airlines, Inc., and fifty per cent (50%) by defendant Hughes Tool Company, and provided, further, that such payments shall be subject to reallocation among any additional parties who may hereafter be joined and who may participate in the depositions.

VI.

Defendant Hughes Tool Company shall file its answer to the complaint herein upon the day following the completion, in accordance wtih the annexed schedule, of the deposition of plaintiff by Charles C. Tillinghast, Jr., Robert W. Rummel and E. O. Cocke.

Pretrial Order, February 7, 1962.

VII.

The deposition of plaintiff by A. V. Leslie, in view of his present illness, is adjourned without date and shall be rescheduled by the Special Master upon reasonable notice by the defendant at an appropriate time in light of [741] the health of the witness and at a date not in conflict with the annexed schedule.

VIII.

Any request for a change in the date fixed for the production of writings and other material by the defendant Hughes Tool Company, presently set for March 15, 1962 by order of this Court dated December 18, 1961, shall be made to the Special Master.

So Ordered.

Dated: New York, N. Y.
February 7, 1962

/s/ Charles M. Metzner
Charles M. Metzner
U. S. D. J.

Pretrial Order, February 7, 1962.

[742]

SCHEDULE OF DEPOSITIONS

I.

Depositions Noticed by Defendant Hughes Tool Company

Date	Deponent	Time and Location of Depositions
Feb. 13, 1962	Trans World Airlines, Inc. By: Charles C. Tillinghast, Jr. R. W. Rummel E. O. Cocke	10 a.m. 80 Pine St. New York, N. Y.
Feb. 20, 1962	Charles Thomas	10 a.m. The Irvine Ranch 13042 Myford Rd. Tustin, Calif.
Feb. 21, 1962	Bank of America By: Keith Carver Robert Gordon	10 a.m. Clerk's Office U. S. Court House Los Angeles, Calif.
Feb. 27, 1962	Bankers Trust Company By: E. P. Ebert	10 a.m., Room 3113 120 Broadway New York, N. Y.
Feb. 27, 1962	Morgan Guaranty Trust Co. of New York By: John Schroeder	2 p.m., Room 3113 120 Broadway New York, N. Y.
Feb. 28, 1962	The Mellon Bank By: Frederick Gwinner Ralph Ehler	10 a.m. Clerk's Office U.S. District Court Pittsburgh, Pa.
Mar. 1, 1962	Ben-Fleming Sessel Robert A. Kerr Irving Trust Company By: Ben-Fleming Sessel Robert A. Kerr	10 a.m., Room 3113 120 Broadway New York, N. Y.
Mar. 8, 1962	Frederic H. Brandi Arthur L. Wadsworth Dillon, Read & Co., Inc. By: Frederic H. Brandi Arthur L. Wadsworth	10 a.m., Room 3113 120 Broadway New York, N. Y.
Mar. 15, 1962	James F. Oates, Jr. Grant Keehn Equitable Life Assurance Society of the United States By: James F. Oates, Jr. Grant Keehn	10 a.m., Room 3113 120 Broadway New York, N. Y.

[743]

Mar. 15, 1962	Warner Mendel	10 a.m., Room 3113 120 Broadway New York, N. Y.

Date	Deponent	Time and Location of Depositions
Mar. 23, 1962	Harry C. Hagerty Gordon P. Jenkins Metropolitan Life Insurance Company By: Harry C. Hagerty Gordon P. Jenkins	10 a.m., Room 3113 120 Broadway New York, N. Y.
Mar. 29, 1962	Irving S. Olds	10 a.m., Room 3113 120 Broadway New York, N. Y.
Apr. 5, 1962	Ernest R. Breech	10 a.m., Room 3113 120 Broadway New York, N. Y.
Apr. 12, 1962	Boeing Company By: William M. Allen J. O. Yeasting	10 a.m. Clerk's Office U.S. District Court Seattle, Wash.
Apr. 19, 1962	Prudential Insurance Company of America By: Monroe Chappelear	10 a.m., Room 3113 120 Broadway New York, N. Y.

II.

Depositions Noticed by Plaintiff Trans World Airlines, Inc.

Apr. 23, 1962	Howard R. Hughes	10 a.m. Beverly Hills Hotel Beverly Hills, Cal.
May 8, 1962	Hughes Tool Company By: Raymond Holliday	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
May 16, 1962	Hughes Tool Company By: M. E. Montrose	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
May 22, 1962	Hughes Tool Company By: C. H. Price	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
May 25, 1962	Hughes Tool Company By: C. S. Johnson	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
May 31, 1962	Hughes Tool Company By: H. E. Rogers	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
June 4, 1962	Hughes Tool Company By: C. Collier	10 a.m., 18th Floor 80 Pine Street New York, N. Y.

Holliday's Answer.

[1124]

[CAPTION] 61 Civ. 2324

Answer of Defendant Raymond M. Holliday

Defendant Raymond M. Holliday (hereinafter "Holliday") by his attorney, Chester C. Davis, for his answer to the complaint herein states:

ANSWERING THE FIRST CLAIM FOR RELIEF

1. Denies each and every allegation of paragraphs 7, 9, 10, 22, 23, 24, 26, 36, 37, 38 and 44 through 55 inclusive of the complaint.

2. Admits the allegations contained in paragraphs 2, 6, 25, 29, 30, 32, 33, 34 and 40 of the complaint.

3. Admits that Hughes Tool Company (hereinafter "Toolco") is a corporation organized and existing under the [1125] laws of the State of Delaware and that it has assets of several hundred million dollars, and except as so admitted denies each and every allegation of paragraph 3 of the complaint.

4. Admits that Howard R. Hughes (hereinafter "Hughes") has been the sole stockholder of Toolco from a time prior to January, 1939 to the present, that from a time prior to January, 1939 to December, 1960, he was an officer of Toolco, and except as so admitted denies each and every allegation of paragraph 4 of the complaint.

5. Admits that he has been for some years past, and now is, an officer of Toolco, that since 1959 he has been, and

now is, a director of Trans World Airlines, Inc. (hereinafter "TWA"), and except as so admitted denies each and every allegation of paragraph 5 of the complaint.

6. Admits that TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States, that since 1946 TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia, that during the period from 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of $100 million, which aircraft were manufactured by manufacturers in various states in the United States, that in 1960 operating revenues of TWA were substantially in excess of $300 million and net income after taxes in excess of $6 million, that in 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, and, except as so admitted, denies that it has knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of the complaint.

[1126] 7. Admits that commencing in or about the year 1939 and at various times thereafter Toolco acquired common stock of TWA, that as at December 31, 1960, the amount of stock so acquired amounted to approximately 78.2% of such common stock, and except as so admitted denies each and every allegation of paragraph 11 of the complaint.

8. Admits that commencing in 1958 jet-powered aircraft became one of the most important factors in the competitive operations of air carriers, and except as so admitted denies each and every allegation of paragraph 12 of the complaint.

9. Admits that by 1955 aircraft manufacturers (including Boeing Airplane Company (hereinafter "Boeing") and Douglas Aircraft Company, Inc. (hereinafter "Douglas")) had prepared to the general knowledge of the air carrier industry plans and drawings and otherwise had undertaken preparations for the manufacture of jet-powered aircraft intended for use by air carriers, that many air carriers beginning in 1955 devoted substantial efforts to determining what, if any, jet aircraft they should acquire and to obtaining jet aircraft suitable to their needs, that Boeing and Douglas contemplated and did ultimately manufacture jet-powered aircraft for long range and medium range flights, and except as so admitted denies each and every allegation of paragraph 13 of the complaint.

10. Admits that General Dynamics Corporation, Convair Division (hereinafter "General Dynamics"), on its own account as one of the four major domestic aircraft manufacturers, commenced a program prior to 1955 for the design, development and manufacture of a jet-powered transport aircraft designated the Model 18, that such program never proceeded past the preliminary design state and was terminated in 1955 by General [1127] Dynamics, and except as so admitted denies each and every allegation of paragraph 14 of the complaint.

11. Admits that prior to May 1, 1956, Toolco considered the manufacture of a jet-powered aircraft with design and range characteristics suitable for use on both domestic and transatlantic routes, that Toolco contemplated that if it did manufacture this aircraft it would furnish the same to TWA and other air carriers, that it abandoned consideration of manufacture of such an aircraft prior to mid-1956, and except as so admitted denies each and every allegation of paragraph 15 of the complaint.

12. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the complaint.

13. Admits that in January 1956 Toolco entered into an agreement with Boeing for the purchase of eight Model 707-131 jet-powered aircraft with an option to purchase seven additional such aircraft, that in 1956 Toolco exercised its option to purchase such additional aircraft and also placed an order for eighteen long-range Boeing jet transports, and that in June of 1956 Toolco committed for the purchase of thirty Convair 880 aircraft from General Dynamics, and except as so admitted denies each and every allegation of paragraph 17 of the complaint.

14. Admits that purchase orders placed by Toolco with General Dynamics and Boeing gave Toolco the right to assign to TWA the right to acquire the jet-powered aircraft ordered by Toolco, and that Toolco released six of the long-range Boeing jet transports on order in a transaction with Boeing and Pan American World Airways, Inc. which was recommended and approved by the management of TWA, and except as so admitted denies each [1128] and every allegation of paragraph 18 of the complaint.

15. Admits that during the period 1956 to 1960 changes were made in the design and configuration of the Model 880 Convair aircraft ordered by Toolco and except as so admitted denies each and every allegation of paragraph 19 of the complaint.

16. Admits that in the period 1959 and 1960 Toolco leased to TWA certain jet-powered aircraft on a day-to-day basis, that such aircraft were the only jet-powered aircraft flown on TWA's scheduled routes during said years,

and except as so admitted denies each and every allegation of paragraph 20 of the complaint.

17. Admits that on or about May 17, 1960, Northeast Airlines, Inc. (hereinafter "Northeast") submitted to TWA a proposed agreement for the merger of Northeast with and into TWA, that Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the east coast of the United States and Canada, that upon information and belief in 1959 Northeast's revenue miles totaled 519,000,000 and its total assets exceeded $35 million, and except as so admitted denies each and every allegation of paragraph 21 of the complaint.

18. Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27 of the complaint.

19. Admits that subsequent to 1955 Toolco discussed with various persons various proposals for the financing of jet-powered aircraft and except as so admitted denies each and every allegation of paragraph 28 of the complaint.

20. Admits that as part of the arrangements with certain banks and insurance companies, Toolco, TWA and three [1129] Voting Trustees (Ernest R. Breech, Irving S. Olds and Holliday) executed an agreement dated as of December 15, 1960, which provided that the TWA stock owned and to be owned by Toolco would be placed in a voting trust (hereinafter "the Voting Trust"), and except as so admitted denies each and every allegation of paragraph 31 of the complaint.

21. Admits that in March 1961, after consideration of TWA's requirements for additional jet-powered aircraft,

some officers of TWA recommended to the Board of Directors of TWA that TWA's needs for jet-powered aircraft would best be served by the acquisition of 20 aircraft, Boeing Model 707 131-B, and 6 aircraft, Boeing Model 707 331-B. The Board of Directors authorized the purchase of such aircraft. On April 30, 1961, TWA and Boeing agreed on the purchase of these aircraft, with related spare parts and equipment, for delivery in 1962 at an ultimate cost estimated at approximately $187,500,000, and that TWA arranged for the borrowing of $147 million in 1961 from certain insurance companies and banks and except as so admitted denies the allegations of paragraph 35 of the complaint.

22. Admits that on or about May 31, 1961, Toolco sent a telegram to Boeing that set forth certain positions of Toolco and except as so admitted denies each and every allegation of paragraph 39 of the complaint.

23. Admits that TWA requested the Securities and Exchange Commission to accelerate the effective date of its Registration Statement to May 18, 1961, and that Toolco opposed such acceleration by reason of certain deficiencies in said Registration Statement, and except as so admitted denies each and every allegation of paragraph 41 of the complaint.

24. Admits that pursuant to the direction of the [1130] Securities and Exchange Commission Toolco's counsel set forth in a letter to the Securities and Exchange Commission and TWA a statement as to the respects in which TWA's Registration Statement might be deficient, that in said letter it was stated to be the position of Toolco that it was compelled to enter into the Voting Trust under conditions which would warrant a termination of the Voting Trust otherwise than in accordance with the terms of the ar-

rangements under which it was created, that it was further stated in said letter that Toolco had requested its counsel to investigate the possibility of enjoining the Boeing purchase transaction or of taking action on behalf of TWA against the persons responsible for any commitments incurred or damages suffered by TWA in connection with such program, and except as so admitted denies each and every allegation of paragraph 42 of the complaint.

25. Admits that after TWA's Registration Statement had been twice amended subsequent to the sending of the aforesaid letter, the Securities and Exchange Commission accelerated the effective date of the Registration Statement as so amended so as to make the Registration Statement effective on May 24, 1961, and except as so admitted denies each and every allegation of paragraph 43 of the complaint.

ANSWERING THE SECOND CLAIM FOR RELIEF

26. Denies each and every allegation of paragraphs 56 through 64, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Holliday repeats to the same extent as if herein fully set forth each and every denial or admission which he has made with respect to the paragraphs so realleged.

[1131] ANSWERING THE THIRD CLAIM FOR RELIEF

27. Denies each and every allegation of paragraphs 67 through 70, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Holliday repeats to the same extent as if herein fully set forth each and every denial or admission which he has made with respect to the paragraphs so realleged.

Holliday's Answer.

As A First and Complete Defense to the Complaint:

28. The complaint, and each of the claims for relief alleged therein, fails to state a claim upon which relief can be granted.

As A Second and Complete Defense to the Complaint:

29. The facts alleged in the complaint do not constitute violations by Toolco, Holliday or Hughes, of Section 1 of the Sherman Act (15 U.S.C. § 1 (1958)), of Section 2 of the Sherman Act (15 U.S.C. § 2 (1958)), of Section 3 of the Clayton Act (15 U.S.C. § 11 (1958)), or of Section 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. § 18 (1946 Ed.)), and since plaintiff TWA and defendant Toolco are both Delaware corporations, this Court lacks jurisdiction over the subject matter of the motion [*sic*] and over each of the claims for relief alleged in the complaint.

As and For A First Affirmative Defense

30. Since 1944 the control of TWA by Toolco, the acquisition by Toolco of more than 78% of the common stock of TWA, and all commercial transactions between Toolco and TWA including all [1132] transactions relating to financing or the acquisition of equipment were subject to and approved by orders of the Civil Aeronautics Board (hereinafter "Board") under Section 408 of the Federal Aviation Act of 1958 (49 U.S.C. § 1378) or the identical provisions of Section 408 of the Civil Aeronautics Act of 1938. Accordingly, pursuant to Section 414 of the Federal Aviation Act of 1958 (49 U.S.C. § 1384) Toolco is exempt and relieved from the operation of the antitrust laws and of all other restraints or prohibitions made by or imposed under authority of law in so far as may have been necessary to enable it to do anything authorized, approved or required by said orders of the Board.

31. The only act alleged in the complaint with respect to the period prior to 1961 which was not specifically approved by the Board was a proposal that Northeast be merged with and into TWA. Such a merger proposal was, however, within the contemplation of the Board in approving control of TWA by Toolco. Moreover, said proposal was specifically conditioned upon the approval of the Board under the applicable provisions of the Federal Aviation Act of 1958, including Section 408 thereof, and upon approval by a majority of the stockholders of TWA other than Toolco voting at a meeting called to approve such a merger.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

32. Holliday adopts, repeats and realleges the allegations of paragraphs 42-48, 50-52, 69-70, 78-85, 87-90, 92-94 of Toolco's answer and counterclaims as though fully set out herein.

33. Neither Toolco, Holliday, nor Hughes ever had any obligation, contractual or otherwise, to acquiesce in, or consent to, the terms and conditions insisted upon by the lending institutions in connection with the 1960 financing as hereinabove described.

[1133] 34. Toolco, Holliday and Hughes were justified in resisting the demands of the lending institutions that the terms and conditions demanded by said lending institutions as a prerequisite to supplying financing be met and in attempting to obtain financing on more reasonable terms. The damage sustained by TWA as a result of delay in obtaining financing was caused solely and exclusively by the insistence of the lending institutions on the terms and conditions hereinabove described, without any improper conduct on the part of Toolco, Holliday or Hughes contributing thereto.

Holliday's Answer.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

35. Holliday adopts, repeats and realleges, to the same extent as though fully set forth herein, the allegations contained in paragraphs 42-48, 50-53, 55, 62, 69-70, 73-76, 78-98 of Toolco's answer and counterclaims.

36. The damages, if any, alleged in the complaint to have been sustained by TWA resulted from the unlawful acts of the additional defendants and were proximately caused by them and did not result from any improper conduct on the part of defendants Holliday, Toolco or Hughes.

37. TWA's inability to obtain financing prior to 1960 and the delay in its jet equipment program occasioned thereby, was caused by and was a result of the unlawful acts of the additional defendants in violation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Such unlawful acts include the following:

(a) A combination and conspiracy to restrain interstate commerce by preventing TWA from acquiring (i) senior long-term financing from others than Equitable and Metropolitan [1134] except with the consent and acquiescence of Equitable and Metropolitan and (ii) senior short-term financing from others than Irving and such banking institutions as it permitted to participate in such financing.

(b) A combination and conspiracy to attempt to monopolize and to monopolize a substantial segment of the interstate trade and commerce of the United States by attempting to monopolize and monopolizing the supplying of senior long-term financing to the major airlines of the United States.

(c) An agreement in restraint of interstate trade and commerce of the United States, to refuse to

supply financing to TWA or Toolco so long as TWA was, is or shall be controlled by Toolco.

(d) A combination and conspiracy to restrain interstate commerce by preventing TWA from obtaining long-term or short-term senior financing except at interest rates fixed in advance by agreement among lending institutions.

(e) An agreement in restraint of interstate trade and commerce of the United States between and among lending institutions, including Equitable and Metropolitan and others, to the effect that (i) none of such lenders would supply financing to any major airline without the consent of the traditional senior lender to that airline, and (ii) in the event that the traditional senior lender to an airline refused to supply financing except upon particular terms, none of the other of such lenders would sully [*sic*] financing to that airline upon any terms.

(f) The acquisition by Equitable, Metropolitan and other lending institutions, through voting trustees, of legal title to more than 78.2% of the capital stock of TWA.

[1135] (g) The refusal of Irving and the refusal of other lending institutions, whether acting alone or in concert, to extend credit to Toolco or Hughes except upon condition that Hughes as sole stockholder of Toolco, and Toolco as controlling stockholder of TWA, agree to grant to such lending institutions an exclusive market for senior financing through the placing of Toolco's TWA stock in a lender-controlled voting trust.

38. Upon information and belief, at some time in or about March of 1960, the additional defendants entered

into a combination and conspiracy with the intent and purpose that:

(a) Equitable and Irving would use their respective positions as traditional senior lender and lead bank to TWA and the conspirators would use all economic and other power at their disposal to obtain and maintain control of TWA for their mutual advantage, including the use of TWA as a market for the supplying of senior financing upon terms advantageous to the lenders.

(b) The conspirators would permit to participate in supplying senior financing to TWA only those whom they selected and would use their concerted efforts to prevent other lending institutions from participating in any TWA senior financing except with the consent of Equitable as to long-term senior financing and of Irving as to short-term senior financing and then only on terms satisfactory to Equitable and Irving.

(c) The conspirators would agree among themselves as to the interest rate to be paid by TWA for senior short-term and long-term indebtedness and would refuse to advance any financing to TWA except after its acceptance of such predetermined interest rates.

[1136] As a result of said conspiracy, and without any fault on the part of Toolco, Holliday or Hughes, the financing of TWA's jet equipment program was delayed and the acquisition of jet equipment by TWA was impeded.

39. In furtherance of and pursuant to the conspiracy hereinabove alleged, the additional defendants:

(a) Caused TWA to enter into a contract of employment with Tillinghast, more fully described in paragraph 53 of Toolco's answer and counterclaims.

(b) Caused TWA to enter into agreements in 1961 for the borrowing of additional funds amounting to $147,000,000 for the purpose of maintaining and perpetuating their control over TWA under circumstances which amount to self-dealing and breach of fiduciary obligations as more fully described in paragraph 53 of Toolco's answer and counterclaims.

(c) Caused TWA to file its complaint in this action in which TWA seeks, among other things, to divest Toolco of its interest in TWA.

40. The damage, if any, sustained by TWA as a result of the unfavorable terms and conditions of the 1960 financing, including the higher interest rate it was required to pay, resulted solely and exclusively from the unlawful acts and conspiracy hereinabove described and were not caused by any improper conduct on the part of Toolco, Holliday or Hughes.

41. TWA's impaired ability to obtain financing, if any, results solely and exclusively from the unlawful acts and conspiracy hereinabove described and by reason of the fact that the lending institutions are using TWA as a captive market for financing and engaging in self-dealing in arranging TWA's financ- [1137] ing and was not caused by any improper conduct on the part of Toolco, Holliday or Hughes.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

42. If the allegations of the complaint relating to the acts alleged to have been committed by Toolco, Holliday

and Hughes and the statements alleged to have been made by them subsequent to 1960 are true, such acts and statements were not wilful and malicious but were justifiable, and true and made for the purpose of protecting Toolco's and TWA's legitimate interests. None of such acts or statements caused any injury or damage to TWA but any injury or damage sustained by TWA was proximately caused by the unlawful acts of the additional defendants.

43. Holliday adopts, repeats and realleges the facts contained in paragraphs 42-48, 50-55, 62-70 and 73-96 of Toolco's answer and counterclaims as though fully set forth herein.

44. The statements alleged in paragraph 46 of the complaint to have been made by Toolco, Holliday and Hughes that the Voting Trust was invalid, if made, were not made wilfully and maliciously but were justifiable and true by reason of the following facts and circumstances:

(a) Additional defendants Metropolitan and Equitable are persons engaged in phases of aeronautics within the meaning of Section 408 of the Federal Aviation Act by reason of activities which, upon information and belief, have constituted them, together with The Prudential Insurance Company of America (hereinafter "Prudential"), the largest suppliers of airline financing in the country upon whom the major airlines of the United States are depended for long-term senior financing. Said insurance companies have dominated, [1138] and now dominate, the supplying of such financing to the major air carriers of the United States. In December, 1960 by the creation of the Voting Trust and the agreements made in connection therewith, Metropolitan and Equitable acquired control of TWA

within the meaning of Section 408 of the Federal Aviation Act of 1958. Neither Equitable nor Metropolitan sought or obtained the approval of the Board pursuant to said Section 408 to such acquisition of control of an air carrier and Metropolitan and Equitable have continued to maintain and perpetuate their control of TWA without Board approval. In August 1961 Metropolitan and Equitable, together with Irving and its associated banks, agreed with TWA to supply to TWA an additional $147 million of senior financing upon terms and conditions calculated to perpetuate the Voting Trust and the control of Equitable and Metropolitan over the business and affairs of TWA. No approval of the Board was sought or obtained to this further consolidation of control by Metropolitan and Equitable. By reason of the facts herein alleged, the acquisition and maintenance of control of TWA by Metropolitan and Equitable through the Voting Trust and the consolidation of that control by giving to Metropolitan and Equitable the power to accelerate indebtedness of TWA upon termination of the Voting Trust was and is unlawful under Section 408 of the Federal Aviation Act of 1958 and the creation and continued existence of the Voting Trust was and is contrary to the public policy of the United States.

(b) Said Voting Trust is further invalid because entered into as a result of acts, combinations and conspiracies in violation of the antitrust laws of the United States as hereinabove alleged.

[1139] (c) Said Voting Trust is further invalid because accomplished and maintained as a result of an unlawful conspiracy to divest Toolco of control of TWA for the benefit of the additional defendants and

as a result of the breach of fiduciary obligations by various of the additional defendants.

45. The demand that TWA's 1961 registration statement be revised was not wrongful and was not made wilfully and maliciously for the purposes alleged in paragraphs 45 and 67 of the complaint but was justifiable [sic] made for the purpose of correcting errors and omissions in said registration statement and in order to protect Toolco and TWA.

46. The request by Toolco for a deferral of the public offering of TWA's debentures was not made for the purpose of wilfully and maliciously injuring the business of TWA but was made for the purpose of permitting Toolco to make a simultaneous secondary offering of both the debentures which it was obligated to purchase and those which it had the option to purchase. Such a secondary offering would have permitted both Toolco and TWA to realize a substantial amount of cash which could have permitted the refunding of the 1960 financing and the termination of the Voting Trust. Upon information and belief the conspirators' refusal to grant Toolco's request for a one week delay was not in the best interest of TWA but was to the detriment of TWA and in order to prevent the realization of sufficient cash resources which might be used to refund the 1960 financing and thus to terminate the Voting Trust.

47. The suggestion by Toolco, Holliday or Hughes that TWA accept a proposed merger with Northeast was not made for the purposes alleged in paragraphs 47 and 67 of the complaint but [1140] was made because such a merger would be advantageous to TWA. Such a merger was recommended to TWA's Board of Directors by Toolco and TWA's operating personnel advised that such a merger

was in the best interests of TWA. Toolco advised that it was willing to discuss with TWA the possibility of Toolco's assuming any financing risk that such merger might otherwise impose upon TWA.

48. The statements alleged in paragraph 46 of the complaint to have been made by Toolco, Holliday or Hughes relating to the purchase of Boeing aircraft and the 1961 financing thereof, if made, were not made wilfully or maliciously but were justifiable and true.

WHEREFORE, Holliday demands judgment dismissing the complaint, together with costs and disbursements.

Dated: New York, N. Y., March 26, 1962.

/s/ CHESTER C. DAVIS
Attorney for Defendant
Raymond M. Holliday
120 Broadway
New York 5, N. Y.

DIgby 9-0660

[18268]

* * *

THE SPECIAL MASTER: Do any other counsel wish to be heard?

Gentlemen, I am ready to rule on this matter. I have given careful consideration to all of the showings that the parties have made, the arguments, and for myself I am satisfied that there was authority for the service of the subpoena.

That the subpoena is binding upon Mr. Hughes, and as I construe the subpoena, it is binding upon Mr. Hughes to appear on September 24, 1962, or in the alternative, as fixed by the Court at any other time that the Court lawfully orders Mr. Hughes to appear [18269] in the courthouse at Los Angeles.

I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena, and its validity and whether it is an authorized act, and I advise and instruct counsel for the Hughes Tool Company to write Mr. Hughes and inform him about my construction of this subpoena, and that I will consider it an express waiver if he fails to communicate with the Court promptly and advise of any other construction of the subpoena, either as to its validity or when he should be required to appear, and if at any future time in this case Mr. Hughes should claim that the service of such subpoena was not authorized, not a valid instrument, not binding as I am construing it, I shall entertain a motion to strike the answer of the Hughes Tool Company and enter judgment against it in this proceeding.

It is very difficult for me to try to do equity to all the parties in this proceeding. Everyone claims he wants to be first.

I recognize what the Court has said about the [18270] plaintiff TWA, and I am most anxious that it not be forgotten in all this dispute in our efforts to try to develop the facts in this proceeding.

For myself I think there have been conscientious efforts on the part of all counsel to try to forward these depositions in the proceedings to date.

I have been giving considerable study to the various seminars that have been held regarding this type of cases, [sic] and the recommendations by courts and counsel concerning such matters, to try to find out ideas or suggestions that I might contribute to more quickly advancing this cause, and try to reduce or end the very large expense that I recognize is going on, as well as to try to see that justice is done in this case.

I feel there is an affirmative burden and duty upon the Court, and therefore upon the Special Master, to act, to try to help to reduce the extent and cost of discovery where it can be done, and to advance as rapidly as possible, even as complicated a case as this is, to the point when it can be tried and disposed of for all the parties.

I know this is not a problem that I have peculiarly had myself, because several counsel have [18271] mentioned this around the time as bothering them — whether or not other procedures could be used that might help to advance this cause, and reduce its protracted nature.

I had thought that before we completed the testimony of Mr. Tillinghast, I would be informed about the ultimate facts that the plaintiff was relying upon to support the various allegations of its complaint, which are largely conclusions of law, but do conform to the requirements of the federal rules concerning such complaints.

I did not think that with the chief executive officer of the plaintiff being deposed, we would reach a point at the conclusion where I would not know the ultimate facts upon

which the plaintiff was relying to establish those various allegations insofar as they had a bearing upon a violation of the antitrust laws.

But, I did find that I was in that position. I think that has an important bearing upon what is equitable in asking testimony of principal witnesses of the defendant in this case, and when that should be required.

I therefore deny the application of the plaintiff, and each paragraph of it, because I have given [18272] particular study about this matter, and what I could do to try to help to advance these proceedings, and regardless of whether on appeal my decision is upheld or reversed, and regardless of what conclusion I shall arrive at today, I want to suggest some action that I think should be taken in this proceeding.

For some time I have been thinking about our progress with this case, and I believe we are reaching a point where it will be expedited by Rule 16 and other procedures, under the rules, which I shall refer to hereafter.

I consider that we may profitably continue with the deposition of Mr. Rummel this next week, but at the close of our session on September 21st, I shall interrupt the sessions for the taking of depositions under Judge Metzner's prior order in this proceeding, of July 21st, as I recall it, until October 1, 1962, at 10:00 a.m.

I invite any and all counsel during the week of September 24th to apply to Judge Metzner for a pre-trial conference, and ask that he enter a pre-trial order in this case covering in his judgment and discretion the following:

1. Either that he hold hearings, and as a [18273] result thereof enter a pre-trial order defining and limiting the legal and factual issues in this case as to the complaint and answer, or in the alternative, that he authorize and direct the Special Master to make a full and complete inquiry with regard to such issues,

and report to the Court with recommendations for the form and terms of such an order and the grounds and basis for any such recommendations.

2. That if the Court appoints and directs the Special Master to recommend such an order, that in addition to the authority granted to the Special Master under prior orders, he be authorized and directed to make the following inquiries of the plaintiff and the defendants regarding the complaint and answer, and concerning the counterclaims and answers to the counterclaims at some later date, but prior to the time depositions in defense of prosecution of the counterclaims are begun.

a. A statement by counsel for plaintiff, either orally or in writing at the option of the Special Master, of each and all ultimate facts and the witness or witnesses who they expect to testify thereto, as to each paragraph of the complaint.

b. Agreements or disagreements by defendants [18274] with each of such claimed ultimate facts.

c. The same procedure to be followed as to each paragraph of the answer and later, as indicated, as to the counterclaims and the answers thereto.

d. Any proposed findings of fact that the Special Master may require from the parties, and comments on opposing parties findings.

e. Exploration in detail as to the extent that the facts may be stipulated by the parties and admissions of fact that can be obtained and the agreement to such stipulations in writing and the definition of the precise areas of factual dispute.

f. Periodic reports to the Court by the Special Master of the progress being made with such responsibilties.

g. A right of review by the Court as to all recommendations of the Special Master and also as to any definitive orders or rulings under such a direction or by application of any of the Federal Rules by the Special Master.

h. Depositions to be interrupted pending completion of such authorized action and then resumed in accordance with the Court's prior orders after the pre-trial order is entered.

[18275] Should no counsel make such an application, as suggested, to the Court by the close of the day on September 26, 1962, the Special Master shall approach Judge Metzner and request that he take such proposed action in order that this case be properly expedited.

* * *

Discovery Proceedings, October 25, 1962.

[18412]

* * *

The Special Master: Anything further, gentlemen?

I am ready to rule on this application of the Tool Company to adjourn the deposition of Mr. Hughes and order the return date of the notice for the taking of the deposition and the return date of the subpoena be adjourned.

[18413] Before telling you what my final ruling regarding the matter will be, I want to advise you of the various considerations that I have been taking into account in addition to your memoranda, your arguments, and the various papers that have been filed.

In the first place, I do not conceive that Judge Metzner set the date of October 29th as a date that necessarily bound the Special Master as to when the deposition of Howard Hughes should be taken, but it was an indication of the thinking of Judge Metzner, and it was to control, depending upon developments in the interim, at least up to October 22nd.

I also have in mind the statement of Judge Metzner in his order, I think it was in July, in which he modified the order concerning the manner in which depositions should be taken, and said, in words similar, but I am not quoting him exactly, that we must not lose sight of the plaintiff's rights in this litigation.

By reason of my position as Special Master, and my attendance at these proceedings, I have been in a position to determine whether the parties have cooperated, whether they have been diligent in their efforts to discover, in producing documents, and I find that [18414] the parties have all cooperated in producing documents in accordance with the Court's order and the orders of the Special Master, that the Tool Company has diligently proceeded with the discovery proceedings in taking these depositions.

Discovery Proceedings, October 25, 1962.

There are several matters pending before the Court which have not been decided, and I think it is important to this litigation that we have the benefit of Judge Metzner's decision concerning them.

I also recognize that Judge Metzner is very busy with the day-to-day business of the court that he has to conduct in the trial of cases, that he has several large matters comparable to this one which have been assigned specially to him by the presiding judge of the court, and there is only so much of his time, by necessity, that he can devote to this litigation.

Therefore, it can only be expected that it would take a reasonable time to get a disposition of the matters pending before him and others that may necessarily be presented to him regarding the problems relating to discovery in this action.

I think that we must take this into consideration both as to the Rule 16 application now under submission and ruling of the Special Master concerning the [18415] privileged documents claimed by the Tool Company, but which, as I understand it, has not even been submitted to Judge Metzner yet because he has not set a time for presentation of that matter to him, as I understand it.

The question has been raised by counsel for the Tool Company as to whether or not there is any cause of action here that can be properly pursued on the ground that the Court does not have jurisdiction of the subject matter.

That issue is not one properly before the Special Master. I have no jurisdiction to pass upon that question.

However, I think it is important to the litigation, and the right of any of the parties, to discover, in that there can be no benefit of a final judgment in this action if the Court does not have jurisdiction of the subject matter, and none of the parties can get their claims properly resolved by the Court if there is a true question of that kind in the case.

Therefore, it is, I think, proper that I take into consideration that there is such a claim being made, and that reasonable opportunity be allowed for its presentation at as early a date as possible to the [18416] Court.

The claim is made, as I observe from various papers presented, and argument, that the Court does not have jurisdiction of the subject matter because the primary jurisdiction is with the Civil Aeronautics Board, an administrative body.

While I have no authority to pass upon that question, and do not purport to give any opinion about it, it seemed to me that I should examine it sufficiently to see whether or not it could be a serious issue in the case, and I am particularly impressed with the fact that under the holdings of the Supreme Court generally the question of primary jurisdiction is an issue of whether the administrative body has an expertise that should be applied to the controversy before the Courts act, that the question as developed in the case of U. S. against RCA, California against the Federal Power Commission, a long line of Interstate Commerce Commission cases, the Shipping Board cases, is whether or not the statute provided for a pervasive regulatory scheme and an exemption from the antitrust laws, and in the cases that I have referred to the Supreme Court has called attention to the fact that the Federal Aviation Act is one of the acts in which [18417] such provisions are made.

On the other hand, in the case of Slick Airways against American Airlines, opinion by Judge Forman in 107 Federal Supplement 199, the Court carefully examined the question of whether or not an antitrust suit could be brought and maintained in the Federal Court despite the claim that there was primary jurisdiction with the Civil Aeronautics Board, and he found that the antitrust action could be maintained, principally on the ground that it was not conceived by the Federal Aviation Act that the relief prayed

for could be granted by the Civil Aeronautics Board, that the Board had no power to grant damages, treble damages, as requested there, and it had no authority to grant the additional injunctive relief asked for.

Then he dealt with the question of whether or not the particular acts complained of were those which were exempted from the antitrust laws or whether there was something beyond that that was involved in the complaint.

On the rehearing he also dealt with the decision in the Court of Appeals of the District of Columbia taking the other position, opinion by Judge Bazelon, and he distinguished that case and adhered to his opinion.

[18418] Then there is a further factor that except in very rare cases the Supreme Court has not said that where they find that there is primary jurisdiction in an administrative body that the case should be dismissed, but they have merely held the case in abeyance pending the action of the administrative tribunal or agency, and after that action proceeded with it.

However, whatever the merits of that claim are, it seems to me it is a factor that I should take into consideration with regard to the time for Mr. Hughes' deposition to be taken, and the opportunity for it to be fairly presented to the Court if the Tool Company wishes to press it.

If the argument on jurisdiction goes to the question of motion for summary judgment or motion to dismiss based upon all of the evidence, then it is an entirely different question, and it seems to me it involves the problem referred to by the Court and counsel before, as to whether or not the Tool Company is entitled to get the litigation disposed of without the plaintiff having an opportunity to find out what its counsel now says could be 75 per cent of the facts from one of the witnesses who from the record already developed before us obviously knows some important [18419] things about this litigation. The extent of

his knowledge, and the range of it, we do not know at this time.

But the question of whether or not a final disposition on motion could be had of the case, assuming the Court had jurisdiction otherwise, without even an opportunity to inquire as to the knowledge of this important witness, is a serious one.

I am not purporting to pass upon either of those questions, but I have examined them sufficiently so that I can say to you that I think it is proper that the Tool Company have an opportunity, within such reasonable time as can be made available to it, to raise them before the Court, which is the proper place, in my opinion, that those questions be raised.

Then I think we have the question of how far the Tool Company fairly should be permitted to go before we think of other parties in this litigation, not with the idea of exhausting the rights of the Tool Company for discovery, but with the concept that there could be a pause that does not injure it, and allow the plaintiff to proceed with some discovery before returning to further discovery for the Tool Company.

In addition to all of this, it seemed to me that [18420] I must consider and inquire into the problem of logistics.

I do not know how many records these parties will have to move to California to properly examine Mr. Hughes, but in view of what has already happened in this case in the depositions before me, I would think that a considerable number and bulk of documentary evidence would have to be taken by all parties in order to properly conduct any examination of Mr. Hughes. That is one factor of logistics.

Another is the number of lawyers, associates, and the amount of stenographic help that would be involved in such an examination.

Roughly, I guess that there might be some 35 to 40 people, counting those around the table here and those that

would have to be working back of the scenes on documents, getting them ready for examination, and the stenographic help.

That may be too large an estimate, or it may be too small. But regardless of how accurate it is, it certainly is a real problem, and it caused me to believe that taking into account two holiday periods, one in November and one in December, it was quite unreasonable and certainly undesirable to contemplate [18421] that many people going back and forth to California several times to try to adjust to problems and the other considerations involved if we would try to take Mr. Hughes' deposition either on October 29th or during that season.

So I have concluded that the Tool Company should be allowed to complete, within the limits that I will describe, the examination of the TWA witnesses, Mr. Leslie and Mr. Breech, and that I will allow the Tool Company, if it cares to, to make an oral application to suspend the deposition of Mr. Cocke, in light of the fact that his difficulty of recollection up to date has been such that I feel that his deposition has not been very productive, and I should wish to give them an opportunity, if they care to, to use the time to the utmost for productive discovery.

I therefore order that the deposition of Howard R. Hughes be adjourned to February 11, 1963, and that the return date for the notice to take depositions and the subpoena be adjourned to that date, and that the deposition be taken at the same time and place.

I have in mind, in that regard, also the fact that Judge Metzner's order appointing me as Special Master was dated February 7th, and it will be a year [18422] at that time during which the Tool Company has had the opportunity to make discovery.

I contemplate also that such period should give it a reasonable time to present whatever motions it cared to

to the Court with regard to the jurisdiction of the Court over the subject matter and elements of primary jurisdiction, or other legal issues of that character, and I would hope that questions in regard to interrogatories will be resolved, that we will have a ruling on the Rule 16 application, and a determination of the right of all parties to any of the documents claimed to be privileged by the Tool Company which is now on appeal.

CAB Orders

[The following constitute all of the orders of the Civil Aeronautics Board with respect to the Hughes Tool Company—TWA control relationship with the following exceptions:

Order No. 3210 (officially reported at 6 C.A.B. 153)

Order No. E-289 (see A-228 to 278, *infra*)

Order No. E-1735 (officially reported at 9 C.A.B. 381)

Order No. E-4701 (officially reported at 12 C.A.B. 192)]

[3910]

Orders
Serial Number 4437

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 26th day of January, 1946

[CAPTION] Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION OF CONTROL

A petition in the form of a letter dated November 14, 1945, having been filed on behalf of Hughes Tool Company, an industrial corporation, for modification of the Board's Order, Serial No. 3210, issued October 17, 1944, in Docket No. 1182, in respect of the conditions attached to the Board's approval of the acquisition of control by Hughes Tool Company of Transcontinental and Western Air, Inc.; and

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408 and 1005(d) thereof, and finding that the modification of the aforesaid Order in the manner requested would be consistent with the public interest;

IT IS ORDERED That the Board's Order, Serial No. 3210, issued October 17, 1944, in Docket No. 1182, be and it is hereby modified by striking paragraph numbered "3" of said Order and substituting therefor the following:

"3. That the terms of this order shall not restrict or affect the right of purchase by Hughes Tool Company through TWA of

(a) aircraft, the purchase of which is provided for in existing agreements between them;

[3911] (b) transportaion from TWA at regularly published rates;

(c) aviation fuel from TWA at prices charged by TWA to other purchasers;

(d) repairs, modifications, maintenance and overhaul service, including parts and materials necessary therewith, from TWA at prices charged by TWA to other purchasers."

By the Civil Aeronautics Board:

/s/ FRED A. TOOMBS

Fred A. Toombs
Secretary

(SEAL)

[3912]

Orders
Serial Number E-922

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 29th day of October, 1947

[CAPTION] Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION

A motion having been filed by Hughes Tool Company for an order modifying Order Serial No. 3210 issued October 17, 1944 in Docket No. 1182, as amended by Order Serial No. 4437 issued January 26, 1946, so as to permit

Hughes Tool Company to sell to Transcontinental & Western Air, Inc. at cost to Hughes Tool Company devices known as "Hughes Airline Radar Units"; and

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408 and 1005(d) thereof, and finding that the modification of Order Serial No. 3210, as amended by Order Serial No. 4437, hereinafter provided for is just and reasonable and is in the public interest;

IT IS ORDERED:

That Order Serial No. 3210 issued October 17, 1944, as amended by Order Serial No. 4437 issued January 26, 1946, be and it hereby is modified by adding thereto the following:

[3913] "4. That the terms of this order shall not restrict the right of Hughes Tool Company to sell to TWA or the right of TWA to purchase from Hughes Tool Company devices known as "Hughes Airline Radar Units" in such quantities as TWA may wish to purchase; *Provided* that the sale price of such "Hughes Airline Radar Units" to TWA shall not exceed the lowest of the following: (a) the cost of such units to Hughes Tool Company; (b) the price at which similar sales of such equipment are made at or about the same time by Hughes Tool Company to any other air line; and *Provided* further that all sales of "Hughes Airline Radar Units" shall be reported to the Board in the manner provided in paragraph 2 of this order."

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN
M. C. Mulligan
Secretary

(SEAL)

[3914]

Orders
Serial Number E-2404

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 27th day of January, 1949.

[CAPTION] Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION

A motion having been filed by Hughes Tool Company for an order modifying Order Serial No. 3210 issued October 17, 1944 in this docket, as amended by Order Serial No. 4437 issued January 26, 1946, as modified by Order Serial No. E-922 issued October 29, 1947, so as to permit the sale of two Lockheed Constellation airplanes bearing manufacturer's Serial Nos. 049-1969 and 049-1970 by Hughes Tool Company to Transcontinental and Western Air, Inc. ("TWA") pursuant to the terms and conditions of the sales agreement dated October 1, 1948, as amended by agreement of December 1, 1948, between said parties; and

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly 205(a), 408 [3915] and 1005(d) thereof, and finding that the further modification of its order in Docket No. 1182, as amended and modified, hereinafter provided for is just and reasonable and is in the public interest;

IT IS ORDERED THAT:

Order Serial No. 3210 issued October 17, 1944, as amended by Order Serial No. 4437 issued January 26, 1946, as modified by Order Serial No. E-922 issued October 29,

1947, be and it hereby is modified by adding thereto the following:

> "5. That the terms of this order shall not restrict the right of Hughes Tool Company to sell to TWA or the right of TWA to purchase from Hughes Tool Company two Lockheed Constellation airplanes bearing manufacturer's Serial Nos. 049-1969 and 049-1970, pursuant to the terms and conditions of the sales agreement dated October 1, 1948, as amended by an agreement dated December 1, 1948, between said parties, provided that the sale shall be reported to the Board in the manner provided in paragraph 2 of the order, and provided further that nothing in the Board's action herein shall be construed as a determination that the equipment here involved is required by TWA in the interest of commerce, the postal service, or the national defense or that the cost thereof to TWA is appropriate for investment and/or rate-making purposes."

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN

M. C. Mulligan
Secretary

(SEAL)

[3916]

Orders
Serial Number E-4160

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 12th day of May, 1950

[CAPTION] Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION

A motion having been filed by Hughes Tool Company for an order modifying Order Serial No. 3210 issued October 17, 1944 in this docket, as amended by subsequent orders, so as to permit the sale of six Lockheed Constellation airplanes bearing manufacturer's Serial Nos. 049-2072, 049-2073, 049-2074, 049-2075, 049-2070 and 049-2084 by Hughes Tool Company to Transcontinental & Western Air, Inc. ("TWA") pursuant to the terms and conditions of the sales agreement dated February 2, 1950; and

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408 and 1005(d) thereof, and finding that the further modification of its order in Docket No. 1182, as amended and modified, hereinafter provided for is just and reasonable and is in the public interest;

[3917] IT IS ORDERED THAT:

Order Serial No. 3210 issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended by adding thereto the following:

> "6. That the terms of this order shall not restrict the right of Hughes Tool Company to sell to TWA or the right of TWA to purchase from Hughes Tool

Company six Lockheed Constellation airplanes bearing manufacturer's Serial Nos. 049-2072, 049-2073, 049-2074, 049-2075, 049-2070 and 049-2084, pursuant to the terms and conditions of the sales agreement dated February 2, 1950, between said parties, provided that the sale shall be reported to the Board in the manner provided in paragraph 2 of this order, and provided further that nothing in the Board's action herein shall be construed as a determination that the equipment here involved is required by TWA in the interest of commerce, the postal service, or the national defense or that the cost thereof to TWA is appropriate for investment and/or rate-making purposes."

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN
M. C. Mulligan
Secretary

(SEAL)

[3918]

Orders
Serial Number E-5324

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 25th day of April, 1951.

[CAPTION] Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION

A motion having been filed by Hughes Tool Company for an order modifying Order Serial No. 3210 issued

October 17, 1944, in this docket, as amended by subsequent orders, so as to permit the (1) sale to Hughes Tool Company by TWA of a Martin 404 aircraft ordered by TWA at the request of Hughes Tool Company pursuant to the terms and conditions of a sales contract dated December 4, 1950; (2) sale to Hughes Tool Company by TWA of a Lockheed Constellation Model 749A aircraft ordered by TWA at the request of Hughes Tool Company pursuant to a letter agreement dated March 2, 1951; (3) financing by Hughes Tool Company in favor of TWA of the final installment on four new Lockheed Constellation Model 749A aircraft on a conditional sales basis pursuant to the terms and conditions of an agreement dated March 2, 1951; and (4) implementation of certain stock agreements dated April 5, 1950, and January 16, 1951, between TWA, Hughes Tool Company and The Equitable Life Assurance Company for the purpose of raising additional equity capital for the purchase of a fleet of aircraft deemed essential by the carrier for its future operations;

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408 and 1005(d) thereof, and finding that the further modification of its order in Docket No. 1182, as amended and modified, hereinafter provided for is just and reasonable and is in the public interest;

IT IS ORDERED THAT:

Order Serial No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended by adding thereto the following:

> [3919] "7. That the terms of this order shall not restrict the right of Trans World Airlines, Inc., to sell and Hughes Tool Company to buy a Martin 404 aircraft and Lockheed Constellation Model 749A air-

craft pursuant to the terms and conditions of sales contracts dated December 4, 1950, and March 2, 1951, between said parties respectively; the financing by Hughes Tool Company in favor of TWA of the final installment on four new Lockheed Constellations Model 749A aircraft under a conditional sales contract pursuant to the terms and conditions of an agreement between the parties dated March 2, 1951; the implementation of certain stock agreements dated April 5, 1950, and January 16, 1951, between Transcontinental & Western Air, Inc., Hughes Tool Company, and The Equitable Life Assurance Company for the purpose of raising additional equity capital for the purchase of a fleet of aircraft, provided that the sale shall be reported to the Board in the manner provided in paragraph 2 of this order, and provided further that nothing in the Board's action herein shall be construed as constituting an approval for rate-making purposes."

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN

M. C. Mulligan
Secretary

(SEAL)

[3920]

Order No. E-8214

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 1st day of April, 1954.

[CAPTION] Docket No. 6607
Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION

A motion having been filed by Delta Air Lines, Inc. praying for (1) a finding that (a) the proposed sale of three Constellation aircraft by Delta to Hughes Tool Company, and (b) the acquisition by Trans World Airlines, Inc. (TWA) from Hughes Tool of the same aircraft are transactions which do not come within the provisions of section 408 of the Civil Aeronautics Act of 1938, as amended; (2) or, if section 408 is applicable, for an exemption from the provisions of said section 408 insofar as such provisions would otherwise prevent these transactions without Board approval; and

A separate application having been filed simultaneously by TWA for an order modifying Order Serial No. 3210 issued October 17, 1944 in Docket No. 1182, as amended by subsequent orders, so as to permit the acquisition by TWA of the three Constellations sold to Hughes Tool by Delta as described above in Docket No. 6607;

[3921] The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408, and 1005(d) thereof, and finding that:

1. The proposed sale of three Constellation aircraft by Delta to Hughes Tool does not constitute purchase of a substantial part of Delta's properties within the meaning of section 408; and

2. The further modification of its order in Docket No. 1182, as amended and modified, hereinafter provided for is just and reasonable and is in the public interest:

IT IS ORDERED THAT:

1. Order Serial No. 3210 issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended by adding thereto the following:

> "7. That the terms of this order shall not restrict the rights of Trans World Airlines, Inc. to purchase, and Hughes Tool Company to sell, three Constellation aircraft pursuant to the terms and conditions of a sales agreement dated April 1, 1954 between said parties; *Provided*, That nothing in the Board's action herein shall be construed as constituting an approval for rate-making purposes."

2. The requests of Delta in Docket No. 6607 to the extent not granted herein be and they hereby are dismissed.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN

M. C. Mulligan
Secretary

(SEAL)

[3922]

Order No. E-10300

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 17th day of May, 1956

[CAPTION] Docket No. 1182

ORDER MODIFYING ORDER APPROVING ACQUISITION

By motion filed May 2, 1956, Trans World Airlines, Inc. (TWA) requests an order modifying Order No. 3210, Docket No. 1182, issued October 17, 1944, as amended by subsequent orders, so that the terms of such order will not restrict the right of TWA to exercise certain options dated April 20, 1956 for the purchase of eight Lockheed 1049G and twenty-five Lockheed 1649A aircraft, and spare engines and parts from the Hughes Tool Company pursuant to conditional sale contracts.

We have considered all of the circumstances surrounding the proposal and find it in the public interest to relax the restrictions in the aforementioned Order No. 3210. The Board has recently awarded TWA several new route segments and it appears that additional aircraft are required to implement such services. Furthermore, it appears that the new equipment is being made available to TWA at cost with the advantage of earlier delivery than would be possible if purchases of like equipment had to be made in the open market. In any event, it should be made clear that in determining that the proposed transaction is in the public interest we are not making any finding as to the reasonableness of the cost of the aircraft and related components for rate making purposes.

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a), 408, and 1005(d) thereof, and finding that the further modification of Order No. 3210 as hereinafter provided is just and reasonable and is in the public interest;

[3923] IT IS ORDERED, THAT Order No. 3210 issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended by adding thereto the following:

> "8. That the terms of this order shall not restrict the right of Trans World Airlines, Inc. to purchase, and Hughes Tool Company to sell, eight Lockheed 1049G and twenty-five Lockheed 1649A aircraft and related spare parts and engines pursuant to the terms and conditions of certain options dated April 20, 1956 and conditional sales contracts between said parties; *Provided*, That nothing in the Board's action herein shall be construed as constituting an approval for rate-making purposes."

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN

M. C. Mulligan
Secretary

(SEAL)

[3924]

Order No. E-10360

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 8th day of June, 1956

[CAPTION] Docket No. 8061, et al.

ORDER INSTITUTING INVESTIGATION

In *Trans World Airlines, Control by Hughes Tool,* Docket No. 1182, 6 CAB 153 (1944), we approved the acquisition of control of Trans World Airlines, Inc. (then known as Transcontinental and Western Air, Inc., hereinafter TWA) by Hughes Tool Company (hereinafter Toolco) under section 408 of the Act subject to the condition, *inter alia,* that approval should be effective so long as commercial transactions between the two companies were limited to items the price of which did not exceed $200.00 each with a total aggregate annual limitation of $10,000.00. We found (p. 156) that "Applicant (Toolco) is not now engaged in, and has no plans contemplating, production of aircraft, aircraft parts, or facilities for use in commercial air transportation." We also found that there was no evidence in the record of an intention on the part of Toolco to engage in any phase of supply for commercial aviation (p. 155). In further proceedings in 9 CAB 381 (1948) we held that a certain letter agreement between Toolco and TWA resulted in further control of TWA for which Board approval was required pursuant to section 408 of the Act. One of the questions in the case was whether any change in the activities of Toolco in the field of aeronautics since the date of the Board's approval in 6 CAB 153 had affected or

altered the character of the control approved therein. We stated that (p. 382) "It is clear that a substantial change in the activities of Toolco in the field of aeronautics would result in a transaction subject to the Board's jurisdiction under section 408 by reason of the fact that the character and priority of control originally approved might be altered or changed as a result thereof." We then found that the principal activity of Toolco at that time consisted of experimental work on aircraft accessories and armament for the Army and Navy. We concluded, therefore, that there had been no substantial change in Toolco's operations in the field of aeronautics since the original order of approval which required further Board consideration, under section 408, of Toolco's control of TWA. In 12 CAB 192 (1950) we approved, on the merits, the further acquisition of control of TWA by Toolco subject to the terms and conditions attached to the Board's approval in 6 CAB 153.

[3925] On May 10, 1956, TWA filed a motion in Docket No. 1182 that the Board modify its Order in 6 CAB 153 so as not to restrict the right of TWA to purchase from Toolco up to 25 jet-powered aircraft suitable for operation by TWA on both its domestic and international routes.

As noted above, the aeronautical activities of Toolco considered heretofore in 6 CAB 153 and 9 CAB 381 did not involve manufacture or sale of aircraft for commercial use. It appears, therefore, that the manufacture of jet aircraft for use of TWA and other airlines by Toolco may result in a substantial change in the activities of Toolco in the field of aeronautics which would require our further consideration, under section 408, of Toolco's control of TWA. However, Toolco has not filed an application for such approval under section 408. Accordingly, we will institute an investigation to determine whether the proposed change in Toolco's activities in the field of aeronautics will result in a transaction subject to the Board's jurisdiction under section 408 and if so, whether we should approve such transac-

tion. We will consolidate therewith TWA's motion in Docket No. 1182 for amendment of the Board's order n 6 CAB 153 since we find that such consolidation will be conducive to the proper dispatch of the Board's business and to the ends of justice and will not unduly delay the proceeding.

ACCORDINGLY, IT IS ORDERED THAT:

1. An investigation, assigned Docket No. 8061, be and it hereby is instituted to determine (a) whether the proposal of Hughes Tool Company to manufacture and sell up to 25 jet-powered aircraft for TWA and other air lines will result in a transaction requiring further Board consideration, under section 408, of the control of TWA by Hughes Tool Company; (b) if so, whether the Board should approve or disapprove such transaction under section 408(b) of the Act;

2. TWA's motion in Docket No. 1182 for an amendment of the Board's order in 6 CAB 153, as amended, be consolidated with the investigation instituted by ordering paragraph No. 1;

3. Said consolidated proceeding be set down for expeditious hearing before an examiner of the Board at a time and place hereafter to be designated.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN

M. C. Mulligan
Secretary

(SEAL)

[3926]

Order No. E-10871

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 18th day of December, 1956

[CAPTION] Docket No. 1182

ORDER

By motion filed with the Board on September 13, 1956 Trans World Airlines, Inc. (TWA) requests modification of the Board's order in Docket No. 1182, Order No. 3210[1], as amended and modified, which restricts commercial transactions between TWA and Hughes Tool Company (Toolco) and between TWA and any affiliate or subsidiary of Toolco to a maximum of $200 each with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000.

The modification is desired to permit TWA to borrow from Toolco up to $10,000,000. Briefly, the transaction is subject to the following terms and conditions: (1) all loans will be made upon unsecured notes of TWA; (2) the initial amount of the credit will not exceed $10,000,000 and will be reduced by $2,500,000 August 11, 1957, November 1, 1957 and February 1, 1958; (3) the credit shall terminate April 30, 1958, or at such earlier time as the treasurer of Toolco deems necessary because of other cash requirements or contractual limitations; (4) borrowings and repayments shall be in multiples of $100,000 and upon reasonable notice to Toolco; (5) all loans shall bear interest for each

[1] 6 CAB 153.

day at a rate equivalent to the then prevailing rate for commercial loans in New York; (6) no commitment fee shall be required; and (7) before each borrowing TWA's counsel shall give Toolco a signed opinion that the promissory note when executed and delivered will be a valid and binding obligation upon TWA. The carrier states that the loan arrangement will operate as a standby credit to be utilized as and when required by TWA, thus providing it with reserve funds in the event additional cash is needed during the [3927] period of credit.

The Board has previously approved the control of TWA by Toolco[2] under section 408 of the Act, and the proposed transaction raises no new question under section 408 of control by Toolco. The Board finds that the proposed transaction does not violate the original intent of the restriction imposed upon transactions between TWA and Toolco; and further modification as ordered herein of the Board's order in Docket No. 1182, as amended and modified, is just and reasonable and is in the public interest.

IT IS ORDERED THAT:

1. Order Serial No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to the extent necessary to permit TWA to borrow from Toolco up to $10,000,000 to be utilized as and when required by TWA as reserve funds in the event additional cash is needed during the period commencing with the date of this order and terminating April 30, 1958, or at such earlier time as the Treasurer of Toolco deems necessary because of other cash requirements or contractual limitations;

2. Such action shall not be a determination for rate-making purposes of the reasonableness of the financial provisions of the transaction;

[2] 6 CAB 153 and 12 CAB 192.

3. The motion, except to the extent granted herein, be and it hereby is denied; and

4. This order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN

M. C. Mulligan
Secretary

(SEAL)

[3928]

Order No. E-11432

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 11th day of June, 1957

[CAPTION] Docket No. 1182

ORDER

By motion amended May 28, 1957, Trans World Airlines, Inc. (TWA) requests modification of Order No. 3210,[1] as amended and modified by subsequent orders, which restricts commercial transactions between TWA and Hughes Tool Company (Toolco) and between TWA and any affiliate or subsidiary of Toolco to a maximum of $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000.

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[1] 6 CAB 153 (Docket No. 1182).

The further modification is desired to permit TWA to refinance its obligations under existing and contemplated conditional sales contracts with respect to the acquisition [2] of 8 Lockheed 1049G's and 25 Lockheed 1649A's and related spare parts and engines. Briefly, the refinancing program would be accomplished in four segments: (1) the issuance by TWA to stockholders and pro rata acquisition by Toolco of new common stock which would net TWA at least $34,000,000; (2) equipment loans from banks and/or insurance companies in the amount of at least $35,000,000; (3) a revolving credit arrangement established by Toolco in favor of TWA up to an amount of $15,000,000, and (4) the balance, if any, from TWA's general funds.

The carrier alleges that the proposed financial program will (1) enable it to reduce its indebtedness by at least $34,000,000 with a corresponding reduction in interest payments; (2) improve its financial structure by decreasing the ratio of debt to equity; (3) ease TWA's monthly debt burden by [3929] extending equipment payments over a longer period; and (4) leave TWA in a much more flexible financial position for future financing of jet equipment and facilities.

The Board has previously approved the control of TWA by Toolco [3] under section 408 of the Act and the proposed refinancing program, including the possible increased percentage of stock held by Toolco in TWA, raises no new questions under section 408 in respect thereto. The Board finds that the proposed transaction does not violate the original intent of the restriction imposed upon transactions between TWA and Toolco; and further modification as ordered herein of Order No. 3210 as amended and modified, is just and reasonable and is in the public interest.

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[2] Previously approved by Order No. E-10300, dated May 17, 1956.

[3] 6 CAB 153 and 12 CAB 192.

IT IS ORDERED THAT:

1. Any additional acquisition of control of TWA by Toolco as may result from the agreement presented herein, be and is hereby approved, provided that such additional control, if any, shall be exercised in accordance with the terms and conditions of the Board's order in 6 CAB 153, as amended, approving the original acquisition of control of TWA by Toolco.

2. Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended so as to permit TWA to sell to Toolco and the latter to buy its pro rata share of an issue of common stock to be offered to TWA's stockholders, as well as related transactions as set forth in the motion as amended;

3. Such action shall not be a determination for rate-making purposes of the reasonableness of the financial provisions of the transaction;

4. The motion, as amended, except to the extent granted herein be and it hereby is denied; and

5. The order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN

M. C. Mulligan
Secretary

(SEAL)

[4759]

Order No. E-12604

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 4th day of June, 1958.

[CAPTION] Docket No. 8061, *et al.*

ORDER TERMINATING INVESTIGATION

On May 10, 1956, Trans World Airlines, Inc. (TWA) filed a motion in Docket No. 1182 that the Board modify its order therein so as not to restrict the right of TWA to purchase from the Hughes Tool Company (Toolco) up to 25 jet-powered aircraft suitable for operation by TWA on both its domestic and international routes.

By Order No. E-10360, adopted June 8, 1956, the Board instituted the instant investigation to determine whether Toolco's proposal to manufacture and sell up to 25 jet-powered aircraft for TWA and other airlines would result in a transaction requiring further Board consideration, under section 408, of Toolco's control of TWA, and if so, whether the Board should approve or disapprove such transaction under section 408(b). The Board also consolidated therein the aforementioned TWA's motion.

Pursuant to a request by counsel for Toolco and TWA, all procedural steps in this proceeding were indefinitely postponed on July 31, 1956. By letter of May 27, 1958, TWA has formally withdrawn its motion of May 10, 1956 in Docket No. 1182, and has requested that the proceedings thereon and in Docket No. 8061 be dismissed without prejudice.

Inasmuch as the proceeding in Docket No. 8061 was instituted to investigate the effect of Toolco's proposal as

set forth in its motion of May 10, 1956 in Docket No. 1182, the Board finds that the withdrawal of said motion by TWA [4760] renders the instant investigation moot, and requires dismissal of said motion;

ACCORDINGLY, IT IS ORDERED THAT:

1. The investigation instituted in Docket No. 8061 be and it hereby is terminated; and

2. TWA's motion of May 10, 1956 in Docket No. 1182 be and it hereby is dismissed without prejudice.

By the Civil Aeronautics Board:

/s/ MARVIN BERGSMAN

Marvin Bergsman
Acting Secretary

(Seal)

[3930]

Order No. E-13334

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 30th day of December, 1958

[CAPTION] Docket No. 1182

ORDER

By motion filed with the Board on April 18, 1958, Trans World Airlines, Inc. (TWA) requests modification of Order No. 3210[1], as amended and modified by subsequent

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[1] 6 C.A.B. 153 (1944)

orders, which restricts commercial transactions between TWA and Hughes Tool Company (Hughes) and between TWA and any affiliate or subsidiary of Hughes to "transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000."

The modification is desired to permit the following transactions between the two companies: (1) sublease by TWA of five L-1049H aircraft from Hughes; (2) sale by TWA to Hughes, upon the happening of certain contingencies, of four L-1049H aircraft which TWA has contracted to purchase from Lockheed; (3) purchase by TWA of $1,155,143 worth of spare parts for L-1649A aircraft from Hughes; (4) guarantee by Hughes of certain TWA obligations under a bank loan and under conditional sales contracts.

In support of its motion TWA alleges, *inter alia*, that the aircraft and spare parts involved in these transactions are needed in the performance of its certificated services; that the terms under which TWA is receiving them involve the payment of no consideration to Hughes other than the rent incurred by Hughes in the case of the leased aircraft and reimbursement of Hughes' actual cost in the case of the L-1649A spare parts; and that the [3931] guarantees by Hughes of TWA's obligations were of substantial advantage to the carrier, were purely for TWA's convenience and entailed no cost whatever to TWA. The carrier states further that, while it believes that payments by TWA to Hughes of the amounts due on TWA's obligations to third parties which may be assumed by Hughes as guarantor are not restricted by Order No. 3210, it would like the Board to clarify the order by eliminating any restrictions on such

payments or modify the order to the extent necessary to allow the payments to be made in this instance.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act[2] and the proposed transactions raise no new issues with respect thereto. All of the transactions, including those involving guarantees by Hughes of TWA's obligations to third parties with the resulting possibility that TWA may, directly or indirectly, make payments to Hughes as guarantor of these obligations, are outside of the scope of the permissible class of transactions stated in Order No. 3210. Accordingly, modification of this order so as to permit such transactions is required. The Board finds that the proposed transactions as set forth in the motion, do not violate the original intent of the restriction imposed upon transactions between TWA and Hughes, and further modification as ordered herein of Order No. 3210, as amended and modified, is just and reasonable and is in the public interest. However, such action shall not be deemed to be a determination for rate-making purposes of the reasonableness of the transactions.

Accordingly, It Is Ordered:

1. That any additional control of TWA by Hughes as may result from the transactions presented herein, be and it hereby is approved, provided that such additional control, if any, shall be exercised in accordance with the terms and conditions of Order No. 3210, issued October 17, 1944, as amended, approving the original acquisition of control of TWA by Hughes;

2. That Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended so as to permit the transactions between TWA and Hughes, as set forth in the motion, to take place;

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[2] 6 C.A.B. 153 (1944) and 12 C.A.B. 192 (1950).

3. That such action shall not be a determination for rate-making purposes of the reasonableness of the transactions;

[3932] 4. That the motion, except to the extent granted herein, be and it hereby is denied;

5. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ MABEL MCCART

MABEL MCCART
Acting Secretary

(SEAL)

[3933]

Order No. E-13542

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 26th day of February, 1959

[CAPTION] Docket No. 1182

ORDER

By motion filed with the Board on January 30, 1959, Trans World Airlines, Inc. (TWA) requests modification of Order No. 3210,[1] as amended and modified by subsequent

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[1] 6 C.A.B. 153, 158 (1944)

orders, which restricts commercial transactions between TWA and Hughes Tool Company (Hughes) to those involving items of property the price of which does not exceed $200 and which restricts the total annual expenditure involved in such transactions by either party to a sum not to exceed $10,000. The modification is desired to permit TWA to lease one Boeing 707-131 aircraft from Hughes as well as to acquire from Hughes a supply of spare parts, not to exceed $100,000 in value, which are needed for the operation of this aircraft.

In support of its motion, TWA states that the aircraft and the spare parts therefor are necessary to enable it to carry forward its jet training program so that it will be in a position to conduct certificated jet service as soon as sufficient jet equipment is delivered.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act,[2] and the proposed transactions raise no new issues with respect thereto. However, the transactions are outside of the scope of the permissible class of transactions stated in Order No. 3210 and modification of that order to permit such transactions is therefore required. The Board finds that the proposed transactions, as set forth in the motion, do not violate the original purpose of the Board in imposing the restrictions contained in Order No. 3210, and further finds that modification as ordered herein is just [3934] and reasonable and in the public interest. However, such action shall not be deemed to be a determination for rate-making purposes of the reasonableness of the transactions.

ACCORDINGLY, IT IS ORDERED:

1. That, subject to the conditions hereinafter set forth, Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended

[2] 6 C.A.B. 153 (1944) and 12 C.A.B. 192 (1950)

to permit the transactions between TWA and Hughes, as set forth in the motion, to take place;

2. That such action shall not be a determination for rate-making purposes of the reasonableness of the transactions;

3. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ MABEL MCCART

Mabel McCart
Acting Secretary

(SEAL)

[3935]

Order No. E-13873

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 15th day of May, 1959

[CAPTION] Docket No. 1182

ORDER

By motion filed with the Board on March 16, 1959, Trans World Airlines, Inc. (TWA) requests modification of Order No. 3210[1], as amended and modified by subsequent orders, which restricts commercial transactions between TWA and

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[1] 6 C.A.B. 153, 158 (1944).

Hughes Tool Company (Hughes) to those involving items of property the price of which does not exceed $200 and which restricts the total annual expenditure involved in such transactions by either party to a sum not to exceed $10,000. The modification is desired to permit TWA to lease on an individual basis up to eleven Boeing 707-131 aircraft from Hughes as they become available, as well as to acquire from Hughes at Hughes' actual cost a supply of spare parts, not to exceed $3,500,000 in value, which are needed for the operation of these aircraft. In addition, modification is requested to permit the lease by Hughes of up to thirty spare jet engines to TWA. The rental charges and other terms of the spare engine leases have not as yet been negotiated.

In support of its motion, TWA states that the aircraft and the spare parts and engines therefor are necessary to enable it to carry forward its jet training program and to commence jet service on its certificated routes. The Board recently authorized a similar transaction between TWA and Hughes involving a single Boeing 707-131 aircraft.[2] The additional aircraft involved in the present transaction will be leased under substantially the same terms as those approved in the prior transaction.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act.[3] However, the transactions are outside the scope of the permissible class of transactions stated in Order No. 3210 and modification of that order to permit such transactions is therefore required. Upon review of the application and all subsequent filings the Board finds that the proposed aircraft lease transactions, and the agreement for the purchase of spare parts [3936] do not violate the original purpose of the Board in imposing the restrictions contained in Order No.

[2] Order No. E-13542, February 28, 1959

[3] 6 C.A.B. 153 (1944) and 12 C.A.B. 192 (1950).

3210 and further finds that modification as ordered herein is just and reasonable and in the public interest. However, inasmuch as the terms of the spare engine leases have not been filed, the Board cannot at this time determine whether modification of Order No. 3210 is justified with regard to the spare engine lease transactions. Therefore, the Board will defer action on TWA's motion insofar as it requests authorization for the lease of thirty spare jet engines to TWA.

Under the agreement, a separate lease will be executed for each aircraft. However, since only four of these leases have been filed, the Board will condition its approval of the instant aircraft lease transactions upon the filing, within ten days of the execution thereof, of each aircraft lease. The Board's action herein shall not be deemed a determination for rate-making purposes of the reasonableness of the transactions.

ACCORDINGLY, IT IS ORDERED:

1. That, subject to the conditions hereinafter set forth, Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit the aircraft lease transactions between TWA and Hughes, and the agreement for the acquisition of up to $3,500,000 worth of spare parts as set forth in the motion to take place;

2. That TWA shall file within ten days of the execution thereof a copy of each aircraft lease;

3. That action on TWA's motion insofar as it requests authorization for the lease of thirty spare jet engines by Hughes to TWA be and it hereby is deferred;

4. That such action shall not be a determination for rate-making purposes of the reasonableness of the transactions;

5. That this order may be amended or revoked at any time in the discretion of the Board without hearing;

6. That the motion, except to the extent granted or deferred herein, be and it hereby is denied.

By the Civil Aeronautics Board:

/s/ MABEL MCCART

Mabel McCart
Acting Secretary

(SEAL)

[3937]

Order No. E-14169

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 1st day of July, 1959

[CAPTION] Docket No. 1182

ORDER

On May 15, 1959, by Order No. E-13873, the Board modified its order approving the acquisition of control of Trans World Airlines, Inc. (TWA) by Hughes Tool Company (Hughes)[1] so as to permit TWA to lease on an individual basis, as they became available, up to eleven Boeing 707-131 aircraft from Hughes and to acquire, when and as

[1] Order No. 3210, issued October 17, 1944. This order, as amended by subsequent orders, restricts commercial transactions between TWA and Hughes to items not exceeding $200 each and totaling not more than $10,000 per year.

needed in the operation of these aircraft, a stock of not to exceed $3,500,000 worth of spare parts from Hughes at Hughes' actual cost. These leases were to be on a day-to-day basis and were to expire no later than June 30, 1959. Ten of these leases have been executed. By motion filed June 29, 1959, TWA requests modification of Order No. 3210 so as to permit the extension of these ten leases under the same rental and other terms until no later than September 30, 1959, as well as to permit the lease, under identical terms, of four additional Boeing 707-131 aircraft, and the purchase from Hughes at Hughes' actual cost of additional spare parts necessary for the operation of the leased jet aircraft.

TWA states that it had anticipated that definitive financing arrangements permitting it to operate these jet aircraft on a permanent basis would have been finalized by June 30, 1959, but that since arrangements for such financing have not as yet been completed the parties to the leases now desire to extend them until September 30, 1959, and to lease additional aircraft during the same period.

[3938] The Board has previously approved the control of TWA by Hughes under section 408 of the Act.[2] However, the proposed transactions are outside the scope of the permissible class of transactions stated in Order No. 3210, and modification of that order to permit such transactions is therefore required. Upon review of the motion, the Board finds that the extension of the aircraft leases, the leasing of four additional aircraft, and the agreement for the purchase of additional spare parts at Hughes' actual cost do not violate the original purpose of the Board in imposing the restrictions contained in Order No. 3210, and further finds that modification as ordered herein is just and reasonable and in the public interest. The Board will condition its ap-

[2] 6 C.A.B. 153 (1944) and 12 C.A.B. 192 (1950).

proval of the four additional aircraft lease transactions upon the filing, within ten days of the execution thereof, of each of these aircraft leases. The Board's action herein shall not be deemed a determination for rate-making purposes of the reasonableness of the transactions.

ACCORDINGLY, IT IS ORDERED:

1. That, subject to the conditions hereinafter set forth, Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit the extension of the currently existing aircraft leases which were approved by Order No. E-13873 and the leasing of additional aircraft by TWA from Hughes and the agreement for the acquisition of additional spare parts as set forth in the motion, to take place;

2. That TWA shall file within ten days of the execution thereof a copy of the heretofore unexecuted aircraft leases;

3. That such action shall not be a determination for rate-making purposes of the reasonableness of the transactions;

4. That this order may be amended or revoked at any time in the discretion of the Board without hearing;

By the Civil Aeronautics Board.

/s/ MABEL MCCART

Mabel McCart
Acting Secretary

(SEAL)

[3939]

Order No. E-14504

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 30th day of September, 1959

[CAPTION] Docket No. 1182

ORDER

On July 1, 1959, by Order No. E-14169, the Board modified its order approving the acquisition of control of Trans World Airlines, Inc. (TWA) by Hughes Tool Company (Hughes)[1] so as to permit, among other things, the extension of ten leases of Boeing 707-131 aircraft by TWA from Hughes[2] until September 30, 1959, and to permit the lease of four additional Boeing 707-131 aircraft. By motion filed September 23, 1959, TWA requests modification of Order No. 3210 so as to permit the extension of these leases, under identical terms, until such time as they are terminated by either party upon 24 hours' written notice.

TWA states that it had anticipated that definitive financing arrangements permitting it to operate these jet aircraft on a permanent basis would have been finalized by September 30, 1959, but that since arrangements for such financing have not as yet been completed, the parties to the leases now desire to extend them until such time as these arrangements are completed.

[1] Order No. 3210, issued October 17, 1944. This order, as amended by subsequent orders, restricts commercial transactions between TWA and Hughes to items not exceeding $200 each and totaling not more than $10,000 per year.

[2] By Order No. E-13873, May 15, 1959, the Board modified Order No. 3210 so as to permit the original lease of these aircraft.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act.[3] However, the proposed lease extensions are outside the scope of the permissible class of transactions stated in Order No. 3210, [3940] and modification of that order to permit such transactions is therefore required. Upon review of the motion, the Board finds that the extension of these aircraft leases does not violate the original purpose of the Board in imposing the restrictions contained in Order No. 3210, and further finds that, under the circumstances described above, modification as ordered herein is just and reasonable and in the public interest. The Board's action herein shall not be deemed a determination for rate-making purposes of the reasonableness of the transactions.

ACCORDINGLY, IT IS ORDERED:

1. That, subject to the conditions hereinafter set forth, Order No. 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit the extension of the aircraft leases as set forth in TWA's motion;

2. That such action shall not be a determination for rate-making purposes of the reasonableness of the transactions;

3. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board.

/s/ MABEL MCCART

Mabel McCart
Acting Secretary

(SEAL)

[3] 6 CAB 153 (1944) and 12 CAB 192 (1950).

[3941]

Order No. E-14877

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 29th day of January, 1960

[CAPTION] Docket No. 1182

ORDER

By motion filed with the Board on November 6, 1959, Trans World Airlines, Inc. (TWA) requests modification of Order 3210,[1] as amended and modified by subsequent orders, which restricts commercial transactions between TWA and Hughes Tool Company (Hughes) and between TWA and any affiliate or subsidiary of Hughes to "transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000." The modification is desired to permit TWA to lease from Hughes on an individual, day-to-day basis up to eight Boeing 707-331 aircraft and up to eight Convair 880 aircraft, and to purchase from Hughes at Hughes' actual cost such spare parts and provisioning for these aircraft as TWA may require.

In support of its motion, TWA states that the aircraft and the spare parts therefor are necessary to enable it to carry forward its jet training program and to provide additional jet service over its certificated routes pending com-

[1] 6 C.A.B. 153, 158 (1944).

pletion of definitive financing arrangements permitting it to operate these aircraft on a permanent basis.

The Board has previously approved the control of TWA by Hughes under section 408 of the Act,[2] and the proposed transactions raise no new issues with respect thereto. However, the transactions are outside of the scope of the permissible class of transactions stated in Order 3210, and modification of that order to permit such transactions is therefore required.

[3942] The Board finds that the proposed transactions, as set forth in the motion, do not violate the original purpose of the Board in imposing the restrictions contained in Order 3210, and further finds that modification as ordered herein is just and reasonable and in the public interest. However, such action shall not be deemed to be a determination for rate-making purposes of the reasonableness of the transactions. The Board will condition its authorization herein upon the filing of each of the aircraft leases within ten days after the execution thereof.

ACCORDINGLY, IT IS ORDERED:

1. That, subject to the conditions hereinafter set forth, Order 3210, issued October 17, 1944, as amended by subsequent orders, be and it hereby is further amended to permit the transactions between TWA and Hughes, as set forth in the motion, to take place;

2. That TWA shall file a copy of each aircraft lease within ten days after the execution thereof;

3. That this action shall not be deemed a determination for rate-making purposes of the reasonableness of the transactions;

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[2] 6 C.A.B. 153 (1944) and 12 C.A.B. 192 (1950).

4. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ MABEL MCCART

Mabel McCart
Acting Secretary

(SEAL)

[3943]

Order No. E-15430

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 23rd day of June, 1960

[CAPTION] Docket No. 1182

ORDER

By motions filed April 1, 1960, April 14, 1960, and May 6, 1960, Trans World Airlines, Inc. (TWA) requests modification of Order 3210,[1] as amended and modified by subsequent orders, which restricts commercial transactions between TWA and Hughes Tool Co. (Toolco) and between TWA and any subsidiary or affiliate of Toolco to a maximum of $200 each and an aggregate annual expenditure in such transactions of $10,000.

The further modifications are desired to permit TWA to finance its obligations with respect to the acquisition of 25 Boeing 707 and 20 Convair 880 jet aircraft, together with

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[1] 6 CAB 153 (Docket 1182).

the necessary engines, spares and equipment required to operate these aircraft on TWA's certificated routes.[2] In addition, TWA desires to acquire Toolco's interests in a flight simulator manufactured by Link Aviation, Inc. for the purpose of training flight crews in the operation of 880 aircraft.

The total cost of these aircraft, engines, spares and equipment is approximately $260,000,000, which would be raised by (1) the sale of $160,000,000 of senior securities (bonds), at 5½% interest, to banks and institutional investors, and (2) the sale of $100,000,000 of junior securities [3944] sold through a rights offering to TWA common stockholders.[3] In the event that such stockholders do not subscribe to their pro rata share of the offering, Toolco will guarantee a net of $100,000,000 to TWA.[4] In addition, Toolco has agreed to lend TWA an additional $50,000,000 to enable TWA to complete the financing plan and maintain its net working capital at not less than $10,000,000. Pending completion of these arrangements, TWA will borrow $50,000,000 from banks on a short term basis, such loan to be guaranteed by Toolco, and repaid from the proceeds of the permanent financing.

TWA believes that the acquisition of the aircraft engines, spares and equipment described above is necessary and desirable to the conduct of its domestic and international operations and that the terms of the financing pro-

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[2] Twenty of the Boeing aircraft are already on lease to TWA from the owner, Toolco. These leases were approved by Orders E-13542; E-13873; E-14169; E-14504; and E-14877. Under the terms of the instant arrangements, TWA will purchase these aircraft from Toolco; Toolco will assign to TWA its interest and contract rights to the remaining five Boeing aircraft. In addition, Toolco will assign its interest and contract rights to TWA in 20 Convair aircraft currently on order from the manufacturer.

[3] The rights offering may be in the form of (1) subordinated debentures convertible into common stock; (2) subordinated debentures with detachable common stock purchase warrants; (3) common stock; or (4) a combination thereof.

[4] This guarantee might require Toolco to subscribe to 100% of the offering.

gram and the transactions with Toolco necessary to carry out these programs are reasonable and in TWA's best interest.

The Board has previously approved the control of TWA by Toolco[5] under section 408 of the Act. It is true that, should the rights offered to TWA stockholders be in the form of common stock and Toolco purchased all the new stock pursuant to its guarantee, Toolco's interest in TWA would increase from the present 78 percent to approximately 90 percent. Although, normally, an increase of 12 percent in stock ownership would be considered substantial and would give rise to a new control relationship under section 408, in view of the overwhelming control of TWA by Toolco by virtue of Toolco's ownership of 78 percent of the stock, the Board concludes that any increase of control is insignificant and does not call for a reexamination of the relationship under section 408.

Upon the basis of the application and the representations contained therein, the Board finds that "the acquisition of the 45 aircraft and the proposed financing program, including the possible increased percentage of common stock held by Toolco in TWA, do not appear to violate the intent of the original restrictions imposed on transactions between TWA and Toolco." Accordingly, further modification of Order 3210 is just and reasonable and is in the public interest. It appears, however, that the transactions may otherwise be subject to section 408 in that they may involve TWA's purchase of a substantial part of the properties of Toolco. However, upon the basis of the above circumstances, the Board finds that the enforcement of section 408 woud be an undue burden on TWA by reason of unusual circumstances affecting its operations and would not be in the public interest. Therefore, for the reasons expressed above, the Board will exempt TWA from section 408 to the

[5] 6 CAB 153, 12 CAB 192, Order E-11432 dated June 11, 1957.

extent that such section might prohibit the transactions without prior Board approval.

[3945] ACCORDINGLY, IT IS ORDERED:

1. That the restrictions imposed on transactions between Toolco and TWA by Order 3210, as modified, are further modified to permit TWA to consummate the transactions described in the aforesaid motions;

2. That TWA be and it hereby is exempted pursuant to section 416 from the requirements of section 408 to the extent necessary to enable it to purchase the instant aircraft and equipment from Toolco, a person engaged in a phase of aeronautics;

3. That the decisions of the Board, as expressed in ordering paragraphs 1 and 2, shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified herein;

4. That the motions, except to the extent granted herein, are denied; and

5. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ ROBERT C. LESTER

Robert C. Lester
Secretary

(SEAL)

[3946]

Order No. E-15561

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 21st day of July, 1960

[CAPTION] Docket 1182

ORDER

By Order E-15430, issued June 23, 1960, the Board authorized Trans World Airlines, Inc. (TWA) to consummate certain transactions with Hughes Tool Company (Toolco) providing for the acquisition of 45 jet aircraft (25 Boeing 707's and 20 Convair 880's) and related equipment.[1] TWA's long term financing program for the acquisition of the aircraft was also before the Board for consideration.

By motion filed with the Board July 1, 1960, TWA requests approval of the acquisition of title to two more Boeing 707 aircraft and five additional jet engines from Toolco. To finance this acquisition, TWA's senior debt will be increased from $160,000,000 to $168,800,000 by the sale of an additional $8,800,000 of its securities to banks and institutional investors.

The motion also presents proposed agreements between TWA and Toolco and between TWA, Toolco and the lending institutions which are intended to implement the transactions approved by the Board in the aforementioned Order E-15430. In addition to the terms and conditions previously

[1] The authorization granted was in the nature of (1) modification of Order 3210 of October 17, 1944, which limited the amount of transactions between TWA and Toolco and (2) an exemption from section 408.

reported to the Board, the agreements provide for an increase in TWA's senior debt from $160,000,000 to $168,800,000 of which $74,000,000 will be obtained from banks at 6% interest and $94,800,000 will be obtained from the insurance companies at 6½% interest.[2] The subordinate or junior debt remains at $100,000,000 which will be obtained by an offering of debentures bearing common stock purchase warrants to the holders of TWA's common stock. Toolco will make up the difference between the amount subscribed by the other [3947] stockholders and $100,000,000. These debentures will bear an interest rate of 6½%. The revolving credit arrangement with Toolco, the purpose of which is to maintain TWA's net working capital at a minimum of $10,000,000 remains at $50,000,000 which, as of the date of purchase of the last jet aircraft in the program, will be converted into a note for the balance then due. Such note shall likewise bear interest at the rate of 6½%.

A voting trust agreement between TWA, Toolco and Irving Trust Company as Notes Agent, for the holders of TWA's senior debt provides that, in the event of default by TWA, Toolco's holdings of TWA's common stock shall be placed in a voting trust which shall be administered by a committee composed of two representatives of the holders of the senior debt and one representative of Toolco.

TWA submits that, except for the addition of the two jet aircraft and five engines, the agreements leading to the conclusion of its long term financing program do not change the substance of transactions approved by the Board in Order E-15430.

The Board finds that the acquisition of two additional jet aircraft and necessary engines and the implementation agreements covering the overall financing of TWA's jet air-

[2] The interest rate of 5½% noted in Order E-15430 applies only to payment by TWA of deposits and prepayments made to Boeing and Convair by Toolco.

craft program do not violate the intent of the original restrictions imposed on transactions between TWA and Toolco in Order 3210; as modified by Order E-15430 issued June 23, 1960. Accordingly, a further modification of that Order is just and reasonable and in the public interest. While the transaction may be subject to section 408 in that it may represent the acquisition by TWA of an additional substantial part of the properties of Toolco, it does not change the substance of the transactions approved by the Board in Order E-15430 which granted an exemption under section 416 from the requirement of section 408 to enable TWA to purchase aircraft and equipment from Toolco, a person engaged in a phase of aeronautics. Under these circumstances, the Board finds that enforcement of section 408 would be an undue burden on TWA by virtue of unusual circumstances affecting its operations and would not be in the public interest. Therefore, the Board exempts TWA from the provisions of section 408 insofar as that section might prohibit the transactions without prior Board approval.

ACCORDINGLY, IT IS ORDERED:

1. That the restrictions imposed on transactions between Toolco and TWA by Order 3210, as modified by Order E-15430 issued June 23, 1960, are further modified herein to permit TWA to consummate the transactions described in the aforesaid motion;

2. That TWA be, and it hereby is exempted pursuant to section 416 from the requirement of section 408 to the extent necessary to enable it to purchase two additional jet aircraft and five engines from Toolco, a person engaged in a phase of aeronautics;

[3948] 3. That this order shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified herein; and

4. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ ROBERT C. LESTER

Robert C. Lester
Secretary

(SEAL)

[3949]

Order No E-16195

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 29th day of December, 1960

[CAPTION] Docket 1182
Docket 2796

ORDER GRANTING EXEMPTION AND APPROVING INTERLOCKING RELATIONSHIP

By motion filed December 23, 1960, Trans World Airlines, Inc. (TWA), to the extent legally necessary, requests modification of Order 3210,[1] as amended and modified by subsequent orders, which restricts commercial [3950] transactions between TWA and Hughes Tool Co. (Toolco) and between TWA and any subsidiary or affiliate of Toolco to a maximum of $200 each and an aggregate annual expenditure in such transactions of $10,000. Approval, under section 408, is also requested, if necessary, for the transactions contemplated under the financing plan. Similarly sought is

[1] 6 CAB 153 (Docket 1182).

approval, to the extent necessary, under section 409 of the Act, of the interlocking relationships arising out of the designation of Raymond M. Holliday, as a representative of Toolco, and of Ernest R. Breech and Irving S. Olds as representatives of the banks and institutional investors, to serve as Voting Trustees under a Voting Trust set up for the Toolco-TWA stock.

The TWA motion herein is the culmination of a series of previously considered motions[2] designed to facilitate the refinancing of TWA's obligations and to provide for its acquisition of jet aircraft[3] and related engines and parts. The prior motions were granted by the Board in Order E-15430, June 23, 1960 and Order E-15561, July 21, 1960 which, among other things, gave general approval, under section 408 of the Act and in accordance with the provisions of Order 3210, to a refinancing plan for TWA of approximately $260,000,000 involving the participation of banks, insurance companies and Toolco. The present application presents a recasting of the original plan, which in its present form, accomplishes a significant modification of Toolco control of TWA.

The plan designed to finance the cost of the "Jet Flight Equipment Program" of TWA provides for (a) the delivery of $72,200,000 principal amount of 6% Equipment Mortgage Serial Notes of TWA, maturing serially on December 31, 1961, and quarterly thereafter through December 31, 1964;[4] (b) the issuance of $92,800,000 principal amount of 6½% Equipment Mortgage Sinking Fund Notes of TWA, due December 31, 1972;[5] and (c) the issuance of

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[2] The motions were filed April 1, 1960, April 14, 1960, May 6, 1960 (considered in Order E-15430, June 23, 1960), and July 1, 1960 (considered in Order E-15561, July 21, 1960).

[3] Boeing 707's and Convair 880's.

[4] The "December 1960 Loan Agreement" with Banks.

[5] The "Note Purchase Agreements" with Insurance Companies.

$100,000,000 principal amount of interim subordinated promissory notes of TWA to Toolco in payment *pro tanto* of the amounts owing by TWA to Toolco at an interest rate not exceeding 7% to mature not earlier than June 30, 1973.

In conjunction with the plan, TWA and Toolco provide for a "Final Accounting and Debenture Purchase Agreement." Under its terms Toolco will transfer title to aircraft, engines and parts to TWA and assign its rights in contracts to acquire such jet flight equipment. Upon the settlement of account of obligations to Toolco, TWA will pay Toolco cash in the amount of $54,892,499.35; $100,000,000 in Interim Subordinated Notes with interest at 6½%; and an additonal cash payment of $1,068,356.52, representing accrued interest on subordinated obligations. In addition, TWA agrees to [3951] make a subscription offer[6] to holders of common stock for an aggregate of not less than $100,000,000 and not more than $112,000,000 subordinated debentures with detachable warrant rights for the acquisition of common stock.[7] Under the "Hughes Financing and Subordination Agreement",[8] Toolco will acquire all the subordinated debentures not subscribed to by the remaining stockholders.[9] The issuance of the Subordinated Debentures will provide TWA the means for refunding the Interim Subordinated Notes in the sum of $100,000,000 issued to Toolco by the resulting cash proceeds or by exchange of

[6] On or before May 31, 1961.

[7] The terms of the debentures and of any stock warrants attached thereto will conform to the recommendations of a special committee appointed for that purpose by and from TWA's investment banking firms. For each $100 of subordinated debentures, the holder shall receive the right to purchase not more than 4 shares of TWA common. The maturity of the debentures may be as late as June 30, 1978.

[8] This agreement is among TWA, Toolco, Irving Trust Company (as Bank Agent), the Institutional Investors, and the Chemical Bank New York Trust Company, as Trustee under the Indenture of Mortgage.

[9] Toolco may not be called upon to purchase more than $100,000,000 worth.

Subordinated Debentures for Interim Subordinated Notes held by Toolco. As a result, the stock interest of Toolco in TWA, now 78%, may be increased.

Under the terms of the "Hughes Financing and Subordination Agreement," Toolco will provide a revolving credit of $50,000,000 in favor of TWA for the period expiring upon the acquisition of the last of 20 Convair 880's which TWA has the right to acquire under the Jet Flight Equipment Program. In addition, Toolco is obligated to lend TWA any sum necessary to insure a net working capital of $10,000,000 until acquisition of the last of the Convair 880's.[10]

Most significantly the financing plan provides measures of assurance regarding the management policies of TWA during the period the securities are outstanding. This is accomplished by a "Voting Trust Agreement,"[11] an "Option Agreement,"[12] and the "Noteholder's Agreement."[13] These agreements provide for a voting trust in respect of TWA stock now held by [3952] Toolco,[14] or thereafter acquired during the life of the trust. The Voting Trust will remain in effect until December 15, 1970, unless previously terminated or extended as provided therein. Toolco, under its right to designate one of the three Voting Trustees has appointed Raymond M. Holliday, a director of TWA. The Notes Agent, acting for the investors, designated the other

[10] TWA will issue subordinated notes for this obligation. Toolco's obligation to provide the net working capital shall cease if the outstanding subordinated notes equals $50,000,000. Repayment of the subordinated notes, during the period specified, is to be made out of any excess over the required working capital.

[11] This agreement is among TWA, the Voting Trustees and Toolco.

[12] This agreement is among Irving Trust Company (as Bank Agent), The Equitable Life Assurance Society of the United States and Metropolitan Life Insurance Company (the Institutional Investors) and Toolco.

[13] This agreement is among Irving Trust Company (as Bank Agent), the Institutional Investors and Irving Trust Company (as Note Agent).

[14] Now amounting to 5,221,301 shares of TWA stock.

two Voting Trustees. The Voting Trustees, acting by majority vote, are empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and will accordingly be in control over TWA management and policies. The Voting Trustees, under the trust, may also act as directors or officers of TWA and may engage in transactions with TWA.[15] Compensation for the services of the Voting Trustees is to be paid by Toolco.

Under the terms of the Option Agreement, Toolco is granted the non-transferable right and option, at any time after December 31, 1961, to purchase any outstanding Serial Notes by payment in full, and by payment in full of the outstanding Sinking Fund Notes plus a premium of 22% until March 31, 1962. The amount of the premium is thereafter reduced at the rate of ½ of 1% for each elapsed quarterly period of three months.

Upon the Board's grant of the requested modification of the limitations of Order 3210, and the consummation of the refinancing plan, a significant and fundamental change will have been accomplished in the control of TWA by Toolco. Upon the execution of the Voting Trust, the Toolco control of TWA will change drastically in both form and substance. No longer will the directors of Toolco be free to enforce their dictates or those of Toolco's controlling shareholder on TWA. Only one of the three voting trustees will represent directly these interests. Two of the voting trustees, selected by the financial institutions, will be independent of Toolco and of Mr. Hughes.

The voting trustees will not be restricted in their power to approve further financing for TWA, nor in their ability to sell, lease, transfer, hypothecate or otherwise dispose of, or manage TWA's assets. In short, their power to control

[15] Any approval herein of the plan of financing shall not, unless specifically so provided, be construed as an approval of any personal transactions between the individual Trustees and TWA assuming such approval by the Board should be required under the Act.

TWA is as plenary as that of Toolco and its controlling shareholder.

We are advised that it was the insistence of the financial institutions upon the establishment and terms of the voting trust and of the conditions for its dissolution which have been the major stumbling block in recent weeks to the consummation of TWA's initial jet financing program.[16] We [3953] have not been told officially of the reasons which motivated the decision of the insurance companies and banks to seek this protection. However, we have not been unaware of TWA's problems.

For example, it is a matter of public record that TWA's major competitors arranged the financing for their jet fleets at a significantly earlier date than did TWA. The impact of this fact may be indeed far-reaching. This may have meant that those carriers obtained their financing at a time when funds could be raised on relatively more attractive terms. In any event, it is clear that TWA will pay substantially higher interest rates for its funds than its major competitors. The fact that this disparity in debt burden can play a significant part in the competitive picture is certainly clear.

Moreover, it is probable that the delay in arranging financing has also prevented TWA from securing delivery of a substantially large portion of the jet fleet which was ordered on its behalf. Thus, TWA was unable to take delivery of the twenty Convair 880's, most of which have been available for the past several months. It appears that the failure to receive this equipment as planned may have played a substantial part in TWA's recent inability to maintain its traffic position relative to its principal competitors. Thus, we note, for example, that the carrier's preliminary

[16] TWA has arranged for the acquisition of 47 jet aircraft. Comparable carriers have acquired, or are in process of acquiring, jet fleets in the neighborhood of twice this size.

traffic reports for the month of November 1960 show that TWA's share of the Big Four domestic passenger market has declined from 23.0 to 20.2 per cent. By way of contrast, United, which was behind TWA, has caught and passed it, increasing its share from 21.3 per cent to 29.0 per cent.[17] It appears to be significant that TWA's major competitors have already taken delivery of much larger jet fleets than TWA is operating and have firm orders for delivery of more.[18]

[3954] Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention.

In short, and without further description of these problems, the Board wishes to make clear the fact that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA.[19] It is clear that such approval would not be

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[17] American suffered a much less severe decline from 32.0 to 30.5 per cent.

[18] Apart from the impact on relative traffic position, there are other respects in which TWA may have been adversely affected by the delays in financing and in the delivery of the Convairs. Thus, the delay may have created increased cost of jet crew qualification both in terms of retraining expense and in keeping such crews available pending delivery. (Such crews cannot be used interchangeably in piston equipment; therefore, the crews which have been qualified in Convairs have presumably not been employed in TWA's revenue service.) At least one of the aircraft has suffered from exposure. The cost of restoring the aircraft to operable condition may be sought to be imposed on TWA.

[19] The Option Agreement requires Toolco, in exercising the option, to provide a satisfactory opinion of counsel that the exercise of the option, by purchase of the notes, does not require governmental or regulatory approval or that such approval has been granted and is in force. No such provision could, of course, preclude dissolution of the voting trust after the ten-year term has expired. Nonetheless, it is clear that Toolco should not resume direct control at that time unless prior approval of the Board is sought and obtained.

forthcoming without a searching inquiry into the public interest factors affecting this control.[20]

We turn now to a consideration of the specific transactions and relationships upon which we must act. The applicants seek either a disclaimer of our jurisdiction or our approval of these transactions. Their need is for a prompt and definitive action by the Board in order that they might consummate the transactions by the December 29th date, set for the complicated closing arrangements. The application has necessarily been brief in its statement of these problems and the short period of time between the date of filing and the date by which our action has been sought has prevented our giving to these matters the study and consideration which would be warranted to resolve satisfactorily the question of jurisdiction. In circumstances such as these when we do not find the transactions contrary to the public interest, and where the parties do not contest our jurisdiction, it is certainly better to assume jurisdiction and to act promptly so that the parties might proceed to a satisfactory resolution of the business situation.

[3955] The basic terms of the financing, including the portion involving transactions directly between Toolco and TWA, are essentially the same as these heretofore approved by Orders E-15561, dated July 21, 1960, and E-15430, dated June 23, 1960. And we find that, as modified, they are in the public interest and should be approved under the terms of Order 3210 and by exemption under section 416 of the Act from the requirements of section 408.

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[20] *See Trans World Airlines, Inc., Further Control by Hughes Tool Company*, 12 C.A.B. 192, 196 (1950), Docket 2796. "Aside from any undesirable influence on an air carrier which might arise because of the acquirer's interest in a given phase of aeronautics, an acquirer of an air carrier is not without responsibility in other respects for an air carrier's general capacity to perform its public responsibilities. For inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable — as indeed the acquirer here under scrutiny had — for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier. Accordingly, in determining whether or not a particular acquisition should be approved, it is necessary to consider the over-all impact of the acquirer's plans and policies with respect to the controlled carrier."

To the extent that the Voting Trustees shall be considered as officers or directors of TWA and nominees of the directors of Toolco, the interlocking relationships between TWA and Toolco should be found in the public interest and approved.

Raymond M. Holliday, Vice President, Assistant Treasurer and Assistant Secretary of Toolco, is a member of TWA's Board of Directors. By Order E-14251, July 22, 1959, the Board approved the holding by Mr. Holliday of any directorships and offices within the system of affiliated and subsidiary companies composed of Toolco and TWA. In view of the previous approval of Mr. Holliday's interlocking relationships, his serving in addition as a Voting Trustee by Toolco nomination will not adversely affect the public interest. Accordingly, approval to the extent required under section 409(a) of the Act is granted herein.

Ernest R. Breech is Chairman of the Board of Directors of Aeronutronic Systems, Inc., a Ford subsidiary which is apparently engaged in research related to space vehicles and related matters chiefly for military purposes. This is his only association which appears to be an aeronautical enterprise.[21] Since it is not engaged in the sale of products to civil air carriers, it is consistent with our practice to approve this relationship.

ACCORDINGLY, IT IS ORDERED:

1. That the restrictions imposed on transactions between Toolco and TWA by Order 3210, as modified by Order E-15561, July 21, 1960, and by Order E-15430, June 23, 1960, are further modified herein to permit TWA to consummate the transactions described in the motion filed herein;

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[21] Mr. Breech has offered and will be asked to submit in detail the full information required by Part 251 of the Economic Regulations. Should the information reveal any additional relationships, the Board would be free to act at that time.

[3956] 2. That TWA be and it hereby is, exempted pursuant to section 416, from the requirement of section 408 to the extent necessary to enable it to consummate the jet aircraft equipment purchases described and set forth in the motion herein;

3. That this order shall not be deemed a determination for rate-making purposes of the reasonableness of any of the transactions specified herein;

4. That to the extent required under section 409(a) of the Act, approval is granted of the relationships which will be created by Raymond M. Holliday, Ernest R. Breech, and Irving S. Olds, serving as Voting Trustees of the controlling stock interest of Toolco, in TWA, under a Voting Trust Agreement;

5. That this Order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

/s/ ROBERT C. LESTER

Robert C. Lester
Secretary

(SEAL)

DOCKET NO. 2796

TWA-HUGHES TOOL COMPANY INVESTIGATION

[SERVED: JANUARY 30, 1948]

Recommended, that the Board find that the transactions evidenced by the letter agreement between the Hughes Tool Company and Transcontinental & Western Air, Inc., dated January 8, 1947, and accepted by the board of directors of TWA on January 9, 1947, have resulted in a further acquisition of control by Hughes Tool Company over TWA within the meaning of section 408 of the Act.

Recommended, that a subsequent hearing be held to determine whether such further or additional acquisition of control by the Hughes Tool Company is consistent with the public interest and fulfills the conditions of said section 408.

[APPEARANCES]

REPORT OF EDWARD T. STODOLA, EXAMINER

PRELIMINARY STATEMENT

This proceeding arises out of an order of the Board[1] instituting an investigation into a letter agreement between the Hughes Tool Company (Toolco) and Transcontinental and Western Air, Inc. (TWA), dated January 8, 1947, and accepted by the board of directors of TWA on January 9, 1947. Among other things, this agreement provided for a substantial money loan by Toolco to TWA in exchange for notes of TWA convertible into shares of common stock of the carrier, and for the reconstitution, upon the occurrence of certain events, of the board of directors of TWA. The Board instituted this proceeding to determine whether said letter agreement or any arrangement or action related thereto, or any change in the activities by Toolco in the field of aeronautics since October 17, 1944,[2] has resulted or will result in an acquisition of control of TWA for which its approval is required pursuant to section 408 of the Civil Aeronautics Act of 1938, as amended; to determine whether such acquisition of control, if any, is consistent with the public interest and fulfills the conditions of said section 408; and for the purpose of entering any such order or taking any such further action as may be appropriate pursuant to the provisions of the Act.

On May 15, 1947, after a prehearing conference had been held on the issues raised by the Board's order instituting this proceeding, respondents Toolco and TWA filed a joint motion requesting an order of the Board to hear and determine separately "the preliminary questions" raised by said order of investigation, and to limit the evidence in the proposed preliminary proceeding accordingly. Upon consideration of the motion, the Board on June 18, 1947,[3] ordered

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[1] Order Serial No. E-289, dated February 7, 1947.

[2] This is the date of the Board's approval of the original acquisition of control by Hughes Tool Company of TWA under section 408 of the Act, Docket No. 1182, *Transcontinental & W. A., Control by Hughes Tool Co.*, 6 C. A. B. 153. (1944).

[3] Order Serial No. E-657, granting in part and denying in part the motion of Hughes Tool Company and Transcontinental and Western Air, Inc.

that a preliminary hearing be held to determine the question of whether the said letter agreement of January 8, 1947, or any arrangement or action related thereto, or any change in the activities of Toolco in the field of aeronautics since October 17, 1944, has resulted or will result in an acquisition of control of TWA pursuant to section 408 of the Act, and ordered further that the hearing on the other issues raised by the Board's order of February 7, 1947, be deferred pending decision on the aforesaid issue. The Board, however, denied the motion of the parties with respect to any limitation of the evidence in this initial or preliminary proceeding. Hearings were held pursuant to this latter order of the Board in Los Angeles, Calif., on September 10 and 11, 1947.

STATEMENT OF ISSUES

Section 408(a)(5) of the Act, makes unlawful, without Board approval, an acquisition of control of an air carrier by a person engaged in a phase of aeronautics. In November 1943, Toolco aplied to the Board under section 408 of the Act for "approval * * * of the control by the applicant of Transcontinental & Western Air, Inc." Toolco was then and thereafter, by reason of several activities, a "person engaged in a phase of aeronautics."

As of December 31, 1943, Toolco owned 440,050 shares of the capital stock of TWA, or approximately 45.6 percent of the total 965,173 TWA shares outstanding on that date. Hearing on the Toolco application for approval of control was held on March 17, 1944. Upon a record in which it was stipulated that the stock then owned by Toolco constituted control of the carrier, the Board approved the acquisition of control of TWA by Toolco.[4]

The order of approval contains no specific reference either to the extent of stock ownership which might be enjoyed by Toolco or to the nature of the aeronautical activities in which Toolco might engage. The Board, however, placed certain conditions in its order of approval

[4] *Transcontinental & W. A., Control by Hughes Tool Co., supra.*

which in effect limits the right of Toolco to engage in commercial transactions involving aeronautical property with TWA.[5]

The basic question to be resolved herein is whether under the facts of record in this proceeding there has been any additional acquisition of control of TWA by Toolco requiring approval by the Board under section 408 of the Act. This question in turn raises two problems: First, whether there can be any acquisition of control of TWA by Toolco which requires Board approval in view of the fact that the Board has previously approved acquisition of control of the air carrier by Toolco; secondly, if, as a matter of law, there can be an additional acquisition of control, notwithstanding the Board's prior approval of control pursuant to section 408 of the Act, whether the instant record shows an acquisition of control of such character as must be approved by the Board. Further, as a part of the general problem of the Board's jurisdiction in this type of case but separate from the question whether or not the transaction represented by the letter agreement has resulted

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[5] The following is the text of order of approval issued October 17, 1944:

"Hughes Tool Company, an industrial corporation, having filed an application requesting that the Board approve the acquisition of control, by the purchase of common stock, of Transcontinental & Western Air, Inc., under section 408 of the Civil Aeronautics Act of 1938, as amended, and a full public hearing having been held thereon, and the Board, upon consideration of the record in this proceeding, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof,

IT IS ORDERED, That the application of Hughes Tool Company be and it is hereby approved, subject to the following conditions:

1. That said approval shall be effective so long as commercial transactions between TWA and Hughes Tool Company and between TWA and any affiliate or subsidiary of Hughes Tool Company are limited to transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000;

2. That TWA shall furnish with its annual report to the Board a supplement thereto showing the total of all cash transactions between TWA and Hughes Tool Company and/or any affiliate or subsidiary thereof, the number of such transactions, the maximum and minimum price of items of property, and the general nature of the commodities involved; and

3. That nothing herein shall restrict or affect the right of purchase by Hughes Tool Company through TWA of aircraft, the purchase of which is provided for in existing agreements between them." (P. 158)

in a further acquisition of control, it appears appropriate to inquire whether or not the Board has continuing jurisdiction over a control relationship previously approved by it under said section 408.

STATEMENT OF FACTS.

Both TWA and Toolco are Delaware corporations. TWA is holder of certificates of public convenience and necessity issued by the Board authorizing it to engage in air transportation both in the United States and in the international field. All of the capital stock of Toolco is owned by Howard R. Hughes; its principal business is located in Houston, Tex., and consists of the manufacture of oil well drilling tools and equipment. Through an unincorporated division of its business, operated under the name of "Hughes Aircraft Company," with its principal place of business at Culver City, Calif., Toolco has been and is at present engaged in certain activities in the field of aeronautics.

Toolco's control over TWA was acquired through gradual purchases of shares of stock, beginning with an initial purchase of only 600 shares in March 1939. By the end of 1939 Toolco held 157,700 shares. The Board in the original acquisition case, decided in October 1944, found that Toolco's first participation in any phase of civil aeronautics followed the acquisition of its interest in TWA in 1939.[6] Prior to 1939, the only activities of Mr. Hughes, the sole stockholder of Toolco, or Toolco itself, associated with any phase of aviation were in experimental and developmental work upon the privately owned and operated equipment of Mr. Hughes or his company. Since 1939, and between that time and 1944, the Board found that Toolco's engagement in a phase of aeronautics consisted in the collaboration between Messrs. Jack Frye, then president of TWA, and Hughes, in the preparation and develop-

[6] *Transcontinental & W. A., Control by Hughes Tool Co., supra,* P. 155.

[2789]

ment, primarily for use by TWA, of the transport plane now known as the Constellation, and in Toolco's development and manufacture of aircraft and aircraft accessories in furtherance of the war effort.

In brief, the aeronautical activities of Toolco represented by the Constellation program involved arrangements between Toolco and the Lockheed Aircraft Corporation for the construction and purchase of this four-engine passenger transport plane. After various changes and modifications as to priorities, deliveries, and the number of aircraft to be purchased, Toolco's agreements with Lockheed were assigned to TWA, with Toolco reserving an option to purchase through TWA 25 of the 40 aircraft to be built under the Constellation specifications. The Board, in holding that Toolco was a person engaged in a phase of aeronautics, paid particular attention to the fact that it retained rights under the Lockhead contracts to 25 Constellations which might have been resold for commercial airline operations. Toolco's option under the contracts has since completely expired and this phase of aeronautical activities on the part of Toolco must be considered ended.

About the time of the contracts for the construction of the Constellations, Toolco acquired 20,000 shares of stock in the Lockheed Aircraft Corporation and was at one time Lockheed's largest stockholder. Toolco's executive vice president described this purchase of stock as a necessary expedient so that there would be a closer contact with Lockheed's operations. When the Army took over the Constellation program during the war, Toolco decided to dispose of its stock in Lockheed. However, through inadvertence, the brokers making the sale failed to dispose of 400 shares of the stock. To the extent that these remaining shares represent an interest in a manufacturer of aircraft, Toolco is engaged, at least indirectly, in that phase of aeronautics. However, this interest in Lockheed perhaps no longer represents a relationship of any real significance,

[2790]

particularly since Toolco's connections with the production and sale of the Constellation aircraft has been terminated.[7]

Aside from the termination of Toolco's relationship with Lockheed in the development of the Constellation transport, the record shows that there has been no substantial change in the aeronautical activities of Toolco since the Board's order of 1944 approving control of TWA. At the time of the hearing in the original control proceeding, Toolco's aeronautical activities were, as already indicated, closely associated with the war effort.

Located at Houston were the Aircraft Strut Plant, manufacturing aircraft landing gear and struts for the Army, and the Dickson Gun Plant, which manufactured gun barrels and was operated for the Army by Toolco under a management contract. Operations in both of these plants terminated following the close of the war. The major wartime aeronautical enterprise of Toolco consisted of the development of the plywood flying boat, HK-1, and a photo reconnaissance plane, known as the XF-11, both on Government contracts. Only one of the former and three of the latter type planes have been produced.

The XF-11 is a plane developed for use in combat and is not adaptable to commercial air transport service. The original contract for the production of the XF-11 contemplated the manufacture of 101 units of this type ship. At the end of the war that contract was cut back to three planes: one static test model and two flying models. The static test model has been delivered to the Army and the first flying model crashed in a test flight and was completely destroyed. The third ship is now in the process of being tested by the U. S. Army, under its responsibility.

HK-1, commonly called the cargo ship, is the only one of its type in existence. This ship, an eight-engine craft alleged to be the largest airplane in the world, was built under a contract let by the Defense Plant Corporation to

[7] As far as shown by this record, TWA has no equipment on order from Lockheed. But, even assuming there have been purchases by TWA of equipment from Lockheed since the date of the hearing or that there may be such purchases in the future, it is difficult to see how any harmful influence could result from Toolco's present small interest in Lockheed with respect to the acceptance or use of Lockheed equipment on the part of the carrier.

the Kaiser-Hughes Company.[8] This contract was later canceled and a new contract was set up between the Defense Plant Corporation (succeeded in interest by the Reconstruction Finance Corporation) and the Hughes Aircraft Company. Under this contract an arrangement is provided whereby Toolco may be permitted to retain the ship for further experimental purposes of its own at prescribed rental rates. This arrangement permits Toolco to get a credit not to exceed $2,000,000 if it expends more than that sum beyond the $18,000,000 fixed price under the contract for the plans. According to Mr. Deitrich, executive vice president of Toolco, this latter clause was included in the contract to enable Toolco to get whatever experimental and developmental experience from the work that possibly existed in it. As of July 30, 1947, Toolco had expended over $7,000,000 of its own funds in the construction of the cargo plane. While it is clear that the cargo ship itself cannot be used for commercial aviation and that it was not intended to be so used, there is no reason to assume that, the experience obtained by Toolco from its construction cannot be used to develop a plane along the lines of this ship, either for the carrying of cargo over long distances or long-range passenger operations.

In addition to the activity involved in the production of the four planes referred to above, which were considered by the Board in the original control proceeding, Toolco has developed and sold, or has contracted to sell, the Hughes Airline Radar Device and certain items of airplane armament, all developed by the aircraft division of the company at Culver City. Furthermore, aside from said purchase contracts, the company has contracts with the United States Government for the following work in the aeronautical field: (1) experimental evaluation of three remote control devices for throttles on airplane engines; (2) experiments on a paravane antenna for Army and Navy

[8] Kaiser-Hughes Company, which was organized in connection with the cargo ship contract, is legally still alive, though it no longer functions. The charter of this company permits it to engage in the manufacture and operation of aircraft but there is no indication in the record that this company will ever be activated again.

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aircraft; (3) experiments on controlling aerodynamic devices by fixes on celestial bodies; (4) experiments involving the design and control of pilotless aircraft; (5) experiments on radio devices in the VHF (very high frequency) field; (6) the manufacture of ammunition hoists and machine gun feed mechanisms for Army and Navy aircraft; and (7) the production of ammunition feed chutes and booster for machine guns for the United States Navy. From the foregoing, it is evident that the plant at Culver City is primarily a large scale development laboratory for aeronautics.

A further aeronautical activity of Toolco consists of conversion work on 14 C-47 aircraft, which represent Army surplus equipment acquired by Toolco since January 1947 for conversion and resale. The record shows that this activity did not commence with orders for said planes before their purchase, but that Toolco went out and purchased these planes in the hope that they would be readily resalable after conversion. Certain of these planes are currently being sold.

The only equipment directly usable by commercial aviation now being manufactured by Toolco is the Hughes Airline Radar.[9] This device is an instrument which works on the radar principle and is capable of warning the pilot of his proximity to any obstruction. These devices are now being sold by Toolco to all commercial airlines that wish them, on a nonprofit basis. The sale of the radar device will also be made to TWA at cost. Purchase orders from that carrier have been received by Toolco which recite that the purchases would be made subject to the terms and conditions of the Board's order approving control by Toolco, as amended,[10] in Docket No. 1182. Apart from the prospective sales to TWA, the effect and extent of which is controlled by the Board, Toolco has marketed, and apparently will continue to market, these devices to other purchasers.

[9] The other devices manufactured by Toolco and developed by it consist of the ammunition hoists, machine gun feed mechanism and boosters, and are purely military equipment.

[10] On October 29, 1947, the Board, by Order Serial Number E-922, modified the original order approving the acquisition in Docket No. 1182 so as to permit Toolco to sell the radar units to TWA.

However, there has been no attempt to market the device formally, the orders received having been more or less spontaneous, flowing from the advertisements which have appeared in connection therewith.

With respect to the contracts upon which Toolco is now engaged for experimental work, the paravane antenna and the very high frequency devices are most likely to be effectively adapted to commercial aviation use. The record shows that title to all the devices now being developed on an experimental basis, save the ammunition hoists and the machine gun feed chute, is in the United States Government and their manufacture for commercial use would require governmental approval. However, there is no reason to believe that the knowledge obtained by Toolco in the manufacture of the paravane antenna or any of the other devices hereinabove referred to, could not readily be applied to the manufacture of similar equipment usable in commercial aviation. The record, however, indicates that Toolco has no present plans for engagement in the commercial production and sale of such aircraft equipment.

There have been but small additions to the stock held by Toolco in TWA since the date of the Board's approval of control. Whereas on October 17, 1944, Toolco owned a total of 440,050 shares, or about 45.1 percent of TWA's outstanding stock, it held but 14,800 more shares, or approximately 46.1 percent of TWA's total outstanding shares, on January 1, 1947. The remaining share holdings are widely dispersed.

The present and contemplated aeronautical activities of Toolco clearly establish its engagement in a phase of aeronautics under section 408 of the Act. We now turn to an examination of the letter agreement of January 8, 1947.

To understand the reason for the letter agreement of January 8, 1947, it is necessary to examine Toolco's relationship to TWA during the period between the end of the recent war and the date of the agreement. The history of this relationship sheds considerable light on the reasons for TWA's financial plight in the closing months of 1946, the purpose of the letter agreement, and its effect upon Toolco's control of the carrier.

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Prior to the end of the war TWA was described by Mr. Deitrich as having "plenty of capital". Like other carriers, TWA was then operating under war-engendered restrictions in equipment. With the war's end, however, came the necessity for expansion, both in equipment and personnel, to operate a network of newly authorized routes. To this end it became imperative to raise additional capital. Efforts at additional financing, however, disclosed a gradual but ever widening rift between the TWA management and Toolco with respect to operating plans and policies for the carrier. No attempt will be made here to recount or outline all of the differences between the TWA management and its principal stockholder. Nor are the merits of such differences of concern here. They are relevant here only as they reflect the background of the events which led to the letter agreement.

As early as January 1945 there were some preliminary discussions between Mr. E. Lee Talman, then senior vice president of TWA, and Mr. Deitrich, with respect to financing for the carrier. Mr. Deitrich then recognized that TWA's capital needs could not be financed without increasing the carrier's common stock base. Mr. Deitrich further informed Mr. Talman that final decision in the matter was up to Mr. Hughes, but indicated that he would do all he could to assist in obtaining Mr. Hughes' approval. Thereafter, Mr. Frye, then president of TWA, and Mr. Hughes had a number of discussions with respect to further financing for TWA. Nothing, however, came of these efforts.

There is evidence to indicate that the management of TWA had been considering plans for capital expansion long before the financial condition of TWA became critical. The officials of TWA and Mr. Deitrich were in agreement that the company needed a broader stock base and that any plan for raising capital required the sale of additional common stock. Yet, no definite program for equity financing was agreed upon. The record demonstrates that attempts at arriving at a financing program acceptable to Toolco were impeded by the lack of faith on the part of Mr. Deitrich and the board of directors of Toolco in the TWA management. In fact, Mr. Deitrich testified that he had lacked confidence in the TWA management for several years.

Following the failure of the TWA management and Toolco to agree on a method to finance TWA's postwar needs, a number of other proposals to raise the required capital came into being. During the latter part of 1945, Mr. Frye approached the Export-Import Bank to establish a line of credit in the amount of 150 million dollars. This loan was to be reduced by the amount of funds and credit secured from private sources. Efforts were also made about this time to secure a loan from the Reconstruction Finance Corporation in the amount of 100 million dollars. On the assumption that one or the other of the foregoing loans might materialize, the management of the carrier felt that perhaps some interim financing might suffice. This led to a proposed bank loan in the amount of 17 million dollars for the purchase of equipment in which the Commercial National Bank and Trust Company of New York and other banks were to participate. Mr. Frye, however, considered this loan inadequate. Meanwhile, during November 1945 a program of debt financing was entered into with the Equitable Life Assurance Society of the United States whereby Equitable purchased an issue of 3 percent sinking fund debentures from the carrier in the principal amount of 30 million dollars.[11] Then in the early months of 1946 Equitable purchased an issue of 2¼ percent sinking fund debentures in the amount of 19 million dollars from TWA. Sinking fund payments of 4 million dollars annually were required under the two series of debenture loans. These payments were to be used forthwith for the retirement of outstanding debentures.

There is nothing in the record to indicate that a successful flotation of stock in a large volume could not have been accomplished at any time during 1945 and during the greater part of 1946. But even as late as 1946 no plans for equity financing had been agreed upon since Mr. Hughes had not consented to such financing. It appears that TWA officials were apparently unable to obtain a firm commit-

[11] The debentures were issued pursuant to a purchase agreement dated November 30, 1945, and in accordance with the provisions of an indenture dated December 1, 1945. The Equitable loan was an equipment loan in that 80 percent of the proceeds thereof were to be used for the purchase of equipment.

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ment from Mr. Hughes for equity financing, although the record shows that there probably would have been no objection to such financing on the part of Mr. Hughes "under proper conditions." One of such conditions, as far as both Mr. Deitrich and Mr. Hughes were concerned, was a change in the management of the carrier. Accordingly, it definitely can be concluded that the lack of financing at least up to this date, resulted from the differences of opinion between the TWA management and its principal stockholder and from the lack of faith expressed by Mr. Deitrich and the Board of directors of Toolco in such management.

It further appears from the record that the TWA board of directors were divided over plans to finance the carrier and with regard to policies regarding its operation. Prior to January 9, 1947 all the directors of TWA were persons acceptable to Mr. Frye. Of the 11 directors who were members of the TWA board prior to its reconstitution on January 9, five were employees of the company and opposed a managerial reorganization of the carrier. The six other nonemployee directors—the so-called "outside" directors —sided with Toolco on the necessity for reorganization of the carrier's administrative or managerial set-up. In Mr. Deitrich's opinion the division in the board of directors was a very strong one, although the minutes of the directors' meetings during this period do not reveal such dissension.

When the anticipated loans from the Export-Import Bank and the RFC did not materialize, presumably because the carrier failed to establish that private financing was unavailable, TWA and Toolco entered into discussions which led to negotiations for large-scale financing through a group of bankers headed by the Bankers Trust Company of New York, and including the Union Trust Co. of Pittsburgh, now the Mellon National Bank and Trust Company. In August 1946 a concrete plan was evolved which would have raised considerable capital. The plan proposed equity financing for TWA to the extent of 25 to 35 million dollars, direct credit from the banks to the extent of 25 million dollars, and an additional 10 million dollars to be furnished by Toolco. The amount to be furnished by Toolco was also

to be raised through a stock issue. This plan thus contemplated equity financing to the total extent of 35 or 45 million dollars. It did not involve prepayment or retirement of the Equitable loan. The banks attached two conditions to the proposed financing: (1) a change of management for TWA, and (2) the security market maintaining its relatively favorable mid-1946 level.

The TWA management was favorable to the so-called Bankers Trust plan except that it did not want itself replaced. Again, differences of opinion between the management of the carrier and the principal stockholder apparently delayed the acceptance of the Bankers Trust plan, even though Mr. Hughes had agreed to the substantial equity financing involved in that proposal. In the end nothing was done until an unfavorable turn in the security market about September 1946 resulted in a withdrawal of the Bankers Trust plan.

Toward the end of 1946 TWA's financial condition had become critical. All efforts at refinancing had failed. The record shows that in the closing months of 1946 TWA could not attract any capital and was facing bankruptcy. The record further shows that Toolco was willing to be of further financial assistance but was unwilling to advance additional money to save the carrier without taking precautions to assure itself that the money would be wisely spent. It was Mr. Deitrich's definite opinion that certain economies were necessary to the life and welfare of TWA and he believed that the TWA management prior to January 9, 1947 was not disposed to effectuate them. Because it was felt that the viewpoint of the majority of stockholders was not adequately represented on the TWA board of directors, plans were made to increase their number or to shorten their term of office. This, however, was not effected because the carrier's bylaws at that time prevented the proposed changes and because of Mr. Deitrich's fear of possible unfavorable publicity which might result. Thus one of the purposes of the letter agreement was the selection of a new or more sympathetic board to run the carrier.

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All these factors contributed to the crisis confronting TWA in the late months of 1946. The letter agreement of January 8 became the means chosen to reorganize the carrier and to save it from bankruptcy.

The letter agreement of January 8, 1947, between Toolco and TWA was accepted by the board of directors of TWA on January 9, 1947. This agreement provides, among other things for: (1) a loan by Toolco to TWA in the amount of 10 million dollars and the issuance to Toolco of 2¾ percent notes due June 2, 1956, for such loan with an option to convert said notes into common stock of TWA; (2) diligent endeavor on the part of Toolco to arrange a 40-million dollar loan of credit with the RFC;[12] (3) a rearrangement of the Equitable financing under the 40-million dollar debenture loan; (4) a reconstitution of the board of directors of TWA so that the majority thereof will be nominees of Toolco; and (5) a requirement that no change be made in the bylaws of the carrier without the written consent of Toolco until all the foregoing changes and conditions had been made:

The notes issued to Toolco under the agreement may be converted at any time prior to their maturity, on 10 days notice, into TWA common stock at the option of Toolco and there appears no possible way for the carrier to avoid the conversion whenever Toolco elects, save bankruptcy.[13] The notes themselves are convertible at a price equal to the average price of the TWA stock for the last 10 days prior to the notice date on the New York Stock Exchange, but in no event for a price less than $5 per share. To provide for the possible conversion, 2,000,000 shares of TWA common stock at $5 par value have been authorized. Thus, if Toolco were to acquire the entire 2,000,000 shares authorized at the minimum conversion price, it would then

[12] The loan contemplated was also to be an equipment loan and is no longer being pressed because it was Mr. Deitrich's opinion that no additional equipment is required by the carrier. However, attempts were being made about the time of the hearing herein to secure a general credit from the RFC in the reduced amount of 10 million dollars.

[13] There is a possibility, however, that TWA may accelerate the conversion since the agreement provides that on January 1, 1950, TWA may require Toolco to exercise its option to convert. The record is not clear as to why that condition was inserted into the letter agreement.

be the owner of about 80 percent of the common stock of TWA issued and outstanding.[14] It should be noted that stock in TWA carries with it no preemptive rights, so that upon the issuance of additional shares present stockholders, other than Toolco, may not require that they be permitted to subscribe to shares proportionate to their present holdings in the carrier. Accordingly, the letter agreement gives Toolco an inalienable right to acquire up to a possible 80-percent stock interest in TWA. It should also be noted that the letter agreement further provides that TWA may not make payments on Toolco's loan before payment in full is made in the 40-million dollar debenture loan held by Equitable, and any advances made to the carrier by the RFC. Under the circumstances, it is not likely that conversion, if Toolco should so elect, could be avoided except by an act of bankruptcy by the carrier.

The loan by Toolco, as just noted, is junior to the 40-million dollar indebtedness to Equitable. TWA was technically in default on this loan at the time the letter agreement was accepted. As a partial consideration for Toolco's loan, Equitable agreed to a rearrangement of the sinking fund requirements under the indenture by making the terms of payment more lenient. The 10-million dollar Toolco loan was advanced to TWA in staggered sums, with an initial advance of 5 million dollars on January 31, 1947. Under a so-called three-party agreement,[15] Equitable agreed to amend the indenture to permit the Toolco loan when the full 10 million dollars became available to the carrier. This was handled in such a manner as to automatically place TWA in default of the indenture if Toolco failed to loan the second 5 million dollars. In the event of default after the full loan had been made, Toolco and Equitable agree to execute a voting trust agreement to which will be pledged all Toolco's shares in TWA either presently owned or subsequently acquired. Toolco will appoint one and Equitable two of the three voting trustees.

[14] If Toolco should convert at $16, the closing market price of TWA stock on December 29, 1947, it would obtain approximately 67 percent of all TWA stock then outstanding.

[15] Agreement between Toolco, TWA, and Equitable.

Immediately upon the consummation of the letter agreement, the board of directors of TWA was reconstituted and 13 additional directors were added to the original 11 then upon the board. The directors added were all nominees of Toolco.[16] In addition to the reconstitution of the board of directors, certain other changes were made in the operation and management of the air carrier after January 9. These changes mainly were in the nature of the replacement of the top management of the carrier, the institution of a rigid program of economy, and the importation of Toolco personnel to analyze TWA problems. The top management of TWA was vested in a temporary executive committee which, at all times had as two of its members either Mr. Bradley and Mr. Leslie, or Mr. Deitrich and Mr. Leslie. Messrs. John Collings and Paul Richter, representing the management of the carrier, also served on this committee.

As a result of these changes the record shows that certain suggestions by Mr. Deitrich were almost immediately thereafter carried into effect. These changes related to the top level management of the company and indicate at least the degree to which the new, and then temporary, management of the carrier on and after January 9, 1947, found itself in agreement with the wishes of the principal common stockholder. Further changes consisted of simplification of the corporate structure of TWA and the cancelation of the Lockheed equipment program.

The regular annual stockholders' meeting of the carrier was held on April 24, 1947. The TWA board was then reduced in number from 24 to 14. Of the 14 individuals who are now members of the TWA board, 6 of the 13 nominated by Toolco on January 9 remained. They are Messrs.

[16] These were Palmer Bradley, Thomas A. Slack, William Streetman, and Richard F. Burns, all members of the law firm representing Toolco; A. V. Leslie, a former banker and now a Toolco employee; Harry Rogers, a production man brought to Kansas City to study maintenance problems of the carrier; W. H. Seimes, another employee of Toolco; A. D. Simpson, president of the National Bank of Commerce of Houston; Oscar Holcomb, Mayor of Houston; and C. E. Millikan, F. J. O'Hara, George C. Summers, and Lloyd Wright, all attorneys. Mr. Deitrich testified that all 13 of these men were well known to the principal stockholder and that he knew that they could be relied upon to exercise that degree of judgment and discretion so that the money loaned to TWA by Toolco would be properly dedicated.

Bradley, Leslie, Simpson, Wright, Holcomb, and Streetman. To their number were added Mr. A. B. Eisenhower, a Kansas City banker, and Mr. Deitrich. The remaining 6 members of the present board are carry-overs from the board of TWA that existed prior to January 9. With this board there exists little probability of conflict over Toolco's policy for TWA.

At this annual stockholders' meeting the TWA bylaws were amended to permit the removal of any director without cause by the vote of the majority of the stock present and entitled to vote at any special meeting of the stockholders. After the annual stockholders' meeting, the newly elected board of directors further[17] amended the bylaws of the carrier to provide, among other things, that special meetings of the stockholders, for any purpose other than that regulated by statute, could be called at the request of holders of 20 percent or more of the capital stock. At such a meeting the stockholders can increase or decrease the number of directors for the purpose of obtaining control. These amendments were obviously designed to make the new board more responsive to the stockholders' wishes.

It would appear that all of the management powers acquired by Toolco as a result of the letter agreement could have been assumed in any event through the voting of its stock at the annual stockholders' meeting held on April 24, 1947. However, it is doubtful whether in the absence of the letter agreement Toolco could have brought about these changes prior to that stockholders' meeting.

SUMMARY OF THE LAW

As already indicated, both Toolco and TWA are Delaware corporations. Section 26 of the Delaware Corporation Law[18] provides that a corporation may amend its certificate of incorporation by adding to or decreasing its corporate powers, or by substituting certain powers and

[17] The bylaws of TWA may be altered or amended by either the stockholders or the board of directors.

[18] Revised Code of Delaware 1935, Chap. 65, Art. 1, Par. 2058, Sec. 26.

purposes in place of those already present therein, or by increasing or decreasing its authorized capital stock or reclassifying it, or by making any other change or alteration in its certificate that may be desired. Every such amendment, however, requires the affirmative vote of a majority of the stock of that corporation entitled to vote on such amendment. Under section 39 of the Delaware Corporation Law[19] proceedings for dissolution must be approved by two-thirds of the voting stock of said corporation; and under section 59 of that law[20] an agreement of merger between a Delaware Corporation and another such corporation, or a corporation of any State must, at least insofar as the Delaware Corporation is concerned, have the approval of two-thirds of the total number of shares of its capital stock.

The provisions of the Civil Aeronautics Act which are principally involved herein are as follows:

> "Sec. 408 (a) It shall be unlawful, unless approved by order of the Authority as provided in this section—
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> • • • • • •
>
> (5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;
>
> • • • • • •
>
> (7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection."
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> • • • • • •

Subsection (b) of section 408, which requires an application to the Board and a hearing, provides in part:

> "• • • Unless, after such hearing, the Authority finds that the • • • acquisition of control will not be con-

[19] Revised Code of Delaware 1935, Chap. 65, Art. 1, Par. 2071, Sec. 39, as amended by 45 Laws of Delaware (1945) Chap. 157, Sec. 3 pp. 596-598.

[20] Revised Code of Delaware 1935, Chap. 65, Art. 1, Par. 2091, Sec. 59, as amended by 43 Laws of Delaware (1941) Chap. 132, Sec. 12, pp. 458-461.

sistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such * * * acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *"

The Board has not heretofore had occasion to render decision upon the question whether, once an acquisition of control of an air carrier has been approved pursuant to section 408, any subsequent transaction can result in an acquisition of control which must also be approved under that section. However, in *Railroad Control of Northeast Airlines,* 4 C. A. B. 379 (1943) the Board in a dictum laid down an interpretation of section 408 which may be applicable to such situation. In that case, the Board found that the Boston & Maine and Maine Central Railroads jointly exercised complete control of Northeast from the date of its organization until 1936, and enjoyed full and positive control from said date until October 1940. The question presented was whether said railroads acquired control of Northeast Airlines within the meaning of section 408(a)(5) of the Act since the effective date of the Act. The Board found that control had been gradually relinquished so that on the date of the hearing the parties retained only about 40 percent of the stock of Northeast, and concluded that section 408(a)(5) did not apply to continuance or maintenance of control by said railroads where control had been acquired by them before the effective date of the Act and had since been diminished. The Board recognized:

"* * * that 'control' as used in section 408 does not necessarily depend upon the ownership of any specific minimum percentage of stock or other ownership rights but rather depends, in the light of all the facts and circumstances in a particular case, upon whether there exists as a matter of fact a power to dominate or an actual domination of one legal personality by another" (p. 381).

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After concluding that it had no jurisdiction in that case because control had been acquired prior to the effective date of the Act and not subsequently increased thereafter, the Board said:

> "While we do not believe that Congress intended us to exercise jurisdiction over a control relationship created prior to the effective date of the Civil Aeronautics Act and existing unchanged from that date forward, we do believe that we possess jurisdiction in a case where the extent of effectiveness of control has increased. The term 'control' does not connote an absolute concept, but represents the amount of power and influence over the controlled corporation. The number of powers and the degree of influence which the controller held on the effective date of the Act must be deemed approved by Congress, but a subsequent increase in the number of powers, or a strengthening of influence, does not in our opinion share this immunity. This is particularly true in a situation where the control at the time Congress acted was only partial, but becomes complete after that time. And in the event of a change in control whereby different or other common carriers acquired controlling interests in an airline, this change would, of course, be subject to our approval under all of the provisions of section 408." (p. 386)

Factually, the situation under consideration in the present proceeding differs somewhat from that involved in the *Northeast* case. Since the railroads had acquired control of Northeast prior to the effective date of the Act, such control was recognized as lawful by the Board on the ground that it must be deemed approved by Congress. This control was not required to meet the statutory test of public interest; no pre-existing approval of control by the Board was involved. Control on the part of the railroads had not increased since the effective date of the Act. Accordingly, the Board found it unnecesary to pass upon

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the applications for approval of control. However, the Board insisted that it would pass upon any increase in "the extent of effectiveness of control."

Though the circumstances giving rise to the *obiter* in the *Northeast* case differ from the facts herein, the present proceeding likewise raises the issue of the application of the words "increase in the extent of effectiveness of control," if the acquisition of additional shares of stock by Toolco would thereby enable it to exercise greater power or effectiveness of control than that contemplated under the Board's original order of approval of October 17, 1944.

Provisions of the Civil Aeronautics Act relating to consolidation, merger, and acquisition of control were modeled after similar provisions of the Interstate Commerce Act and amendments thereto. Section 408 of the Civil Aeronautics Act was borrowed almost word for word from section 213 of the Motor Carrier Act of 1935.[21] Section 213, on the other hand, was patterned on section 5 of the Transportation Act of 1920.[22] Accordingly, persuasive weight may be given herein to decisions of the Interstate Commerce Commission construing the word "control" and dealing with the concept of acquisition of control or changes in the extent of effectiveness thereof in relationships comparable to that before us in the instant proceeding.[23]

The Commission has rendered decisions in varying situations involving changes in the character, extent or effectiveness of control on the part of an acquirer of a carrier subject to the unification and control provisions of the Interstate Commerce Act. On brief, public counsel have

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[21] 49 Stat. 555.

[22] 41 Stat. 481. The Motor Carrier Act became Part II of the Interstate Commerce Act. The unification and acquisition of control provisions of the Interstate Commerce Act were further revised by the Transportation Act of 1940 (54 Stat. 905). This latter Act in its Part III extended Commission jurisdiction to water carriers, while Parts I and II govern as theretofore rail and motor carriers, respectively. Section 213 of the Motor Carrier Act was repealed; its provisions were removed to Section 5, Part I. Section 5(2) to (13) now deals with unification and acquisition of control for all three types of carriers.

[23] *Acquisition of Marquette by TWA—Supplemental Opinion* 2 C. A. B. 409 (1940); *American President Lines, et al., Petition*, 7 C. A. B. 799 (1947); Cf. *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 480-481 (1932).

submitted a survey of I. C. C. cases bearing on the general issue of the Commission's jurisdiction as affected by existing conditions of control and the measure or extent of further control sought to be established.

A number of the decisions involve somewhat different ownership and control relationships than under consideration herein. To the extent, however, that the various decisions hold that further control of a carrier may be acquired through stock purchases where the pre-existing control does not cover all of the corporate activities of the controlled company they constitute a rather consistent policy on the part of the Commission in requiring approval of stock-purchase transactions vesting substantive rights in an acquirer of stock it did not theretofore have. In fact, several of these decisions involve situations which bear strong analogy to the circumstances present in the instant proceeding.

The Commission's holdings as to its jurisdiction with respect to application proposing acquisitions in situations involving pre-existing control of one type or another may be summarized as follows:

(1) Where the applicant already owns a majority of the stock more of which is sought to be acquired, Commission approval is not required where such acquisition will not result in any other or further control on the part of the acquirer.

It was so held in *Control of Peoria & Eastern by Big Four*, 71 I. C. C. 747 (1922) where an application was filed with the Commission by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to purchase all the outstanding stock of Peoria not already owned by the applicant. At the time of filing of said application, applicant owned $5,000,100 par value of Peoria's capital stock of which there was outstanding $9,994,020 out of total authorized capital of $10,000,000. Based upon these facts the Commission stated:

> "By paragraph (2) of section 5 of the Interstate Commerce Act, we are authorized to approve the

acquisition, to the extent indicated by us, by one carrier engaged in interstate commerce of the control of any other such carrier by the purchase of stock or in any other manner specified. In this case, however, so far as appears, the purchase of the remaining stock of the carrier will not give the applicant any other or further control over such carrier than that which it had acquired prior to the enactment of the paragraph. It can only be said that the applicant, in this proceeding, is seeking to acquire that which it admittedly has heretofore acquired. We are, therefore, of the opinion that the application is not within the scope of the paragraph above referred to." (pp. 747-748).

A similar conclusion was reached in *Kittrell-Control-Dixie Motor Coach Corp.*, 35 M. C. C. 25 (1939) where the Commission stated that a majority stockholder need not obtain approval of the purchase of additional shares of stock. The Commission in passing upon an application filed under section 213 of the Motor Carrier Act said:

> " • • • as previously indicated, applicant already controls Sunshine through ownership of a majority of its capital stock. The proposed purchase by applicant of 611 additional shares of stock in Sunshine accordingly does not involve an acquisition of control of that carrier within the meaning of section 213 • • •" (p. 26).

Other decisions have followed the same rule.[24] However, the Commission has assumed jurisdiction to approve control by lease where control by stock ownership, even if legally complete, already existed.[25]

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[24] See, in accord, *Securities of Colorado & Southern*, 86 I. C. C. 213, 218 (1924); *Securities of Chesapeake & H. Ry. Co.*, 150 I. C. C. 248, 249 (1929).

[25] *Acquisition of Control of C. V. & M. R. R. by P. R. R.* 70 I. C. C. 301 (1921); *Lease of Island Creek R. R.*, 117 I. C. C. 670 (1927); *Control of Washington & Vandermere R. R.*, 124 I. C. C. 307 (1927).

2. Where an acquisition by one who is already a majority stockholder of a carrier results in the domination of more activities of the controlled company than permitted a majority stockholder or in the creation of a substantive measure of additional control, the Commission has taken the position that such an acquisition is subject to its jurisdiction.

Perhaps the leading case on this proposition is *Control of Big Four by New York Central*, 72 I. C. C. 96 (1922). This case involved prior control on the part of the New York Central through ownership of 52.9 percent of the common stock of the Big Four, but none of the latter's preferred stock, which had the power to reject any increase in bonded indebtedness or any lease resulting in increased fixed charges. The Commission, in assuming jurisdiction and granting New York Central authority to acquire a majority of the preferred stock,[26] said:

> "* * * Such ownership (of 52.9 percent), however, does not constitute complete control, since it appears that the consent of a majority of the preferred stock is required for the issuance of the Big Four of any evidences of funded debt or the making by it of any lease of railway property which may entail increased fixed charges. This application is made, therefore, for authority to acquire that *further and more complete measure of control* which will result from the ownership by the applicant of

[26] Respondents argue that this and the two cases that follow are distinguishable from subject proceeding on the grounds that (a) no order of prior approval authorizing the pre-existing control had been issued by the Commission in those cases, and (b) that acquirers voluntarily applied for approval. The absence of a prior ratification by the Commission of the status of control existing at the time of the applications for approval of further control in these cases does not make irrelevant the doctrine established by this group of decisions. The Commission took the position that "control" within the meaning of the statute meant complete legal control. The existence of a prior order of approval would have been significant only to the extent that it may or could have by its terms granted the acquirer the full and complete control contemplated by the statute. Moreover, even if there had been prior orders of approval, they may not have approved degrees or elements of control not then in existence. Furthermore, the fact that the applications for approval were voluntarily made does not make these decisions less useful as authority. Obviously, jurisdiction under the statute could not have been conferred upon the Commission by the parties. The Commission's power and authority to require approval is the same, assuming the parties are correct, whether it acts pursuant to voluntary application or on its own motion.

at least a majority of the preferred stock." (pp. 96-97, emphasis added).

Similarly, in *Control of C. St. P., M. & O. Ry. Company*, 105 I. C. C. 543. (1926) application was filed under section 5(2) of the Interstate Commerce Act by the Chicago & Northwestern Railway, which then owned 50.04 percent of the stock in Omaha Railway, for authority to acquire further control of the latter road. The Commission adopted the view that further control of the Omaha Railway by applicant would enable applicant to take steps toward complete unification of operations through lease or merger or consolidation, as permitted by law, and exercised jurisdiction to approve the acquisition. In *Peoria & E. Ry. Co. Control*, 236 I. C. C. 749 (1940) the Commission approved acquisition by applicant Cleveland, Cincinnati, Chicago & St. Louis Railway of further control of the Peoria & Eastern by purchase of additional shares of stock where the applicant already owned a numerical majority (50.02 percent) of the shares outstanding. The Commission found that while a bare majority gave the applicant a measure of control over the Peoria & Eastern, under the laws of Illinois various corporate actions, including the renewal of a charter by railroad corporations, must be approved by a vote of more than such a majority. The applicant sought approval of the purchase of additional shares of stock in order to accomplish renewal of the Peoria & Eastern charter in accordance with Illinois law.[27] The purchase of additional shares was found to represent a further acquisition of control.

A case recently decided by the Commission has likewise recognized that control through stock ownership of most but not all corporate activities does not prevent the Commission from authorizing further or additional control.

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[27] The charter of a railroad corporation can be renewed, under the laws of Illinois, by stockholder's action if three-fourths of the votes cast at any regular election for that purpose favor such renewal, provided, however, that those voting for renewal agree to purchase the stock of those opposed. Applicant sought approval of its plan to purchase additional shares in order to be able to vote for renewal and to be in the position to make the required agreement, if necessary.

[2810]

In *Wheeling and Lake Erie Railway Company Control,* Finance Docket 15685, decided June 25, 1947, an application by the Nickel Plate, the Chesapeake and Ohio Railway Company and the Allegheny Corporation was filed under section 5(2) of the Interstate Commerce Act, seeking approval of the acquisition by Nickel Plate of certain shares of stock in the Wheeling Railway Company. C. & O. and Allegheny joined in this application because of C. & O.'s direct control of Nickel Plate and Allegheny's indirect control of Nickel Plate through the C. & O. Nickel Plate is controlled by C. & O. through ownership of 77 percent of its outstanding common stock and C. & O. is in turn controlled by Allegheny through the ownership of 6.74 percent of C. & O.'s common stock. Nickel Plate's interest in Wheeling amounts to nearly 47 percent. C. & O.'s interest in it is 21 percent, and Allegheny's interest in that company is 0.01 percent. Collectively these interests aggregated approximately 68 percent.[28] It was proposed that Nickel Plate purchase C. & O.'s and Allegheny's stock interests in Wheeling, which would have the effect of giving it, Nickel Plate, the approximate 68 percent ownership of that company. The Interstate Commerce Commission held, on these facts, that Nickel Plate's acquisition "of further control of the Wheeling and Lake Erie Railway Company through stock ownership * * * is a transaction within the scope of section 5(2) of the Interstate Commerce Act * * *".

The Commission thus found that the conversion of a 47-percent interest into a 68-percent legal ownership of

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[28] This control relationship was previously approved in Finance Docket No. 15181 et al, *Wheeling & Lake Erie Railroad Co. Control,* 267 I. C. C. 163 decided December 10, 1946, wherein the Commission approved the sale to Nickel Plate of 78,145 Wheeling shares beneficially owned by the C. & O. Nickel Plate thereby acquired a near 47-percent interest in Wheeling. Prior thereto the C. & O. and Nickel Plate owned 35.1 and 32.9 percent, respectively, of the voting stock of the Wheeling and all of these shares of stock were deposited in trust. Before December 1946, there therefore existed, as far as C. & O. and Nickel Plate were concerned, a separation of ownership from control. The events leading to the trusteeing of the Wheeling stock are set forth in 156 I. C. C. 607. However, by supplemental report and order in Finance Docket No. 15181, dated March 10, 1947, the Commission approved and authorized, among other things, a termination of the trust of all of the Wheeling stock acquired by Nickel Plate.

the company was a transaction subject to its jurisdiction, and in so finding stated as follows:

> "Protection of the Nickel Plate's interest in Wheeling might be affected through acquisition of enough of the latter's stock, 3 or 4 percent, to give the Nickel Plate a majority, or numerical control; but the applicants urge that merger or consolidation of the companies is necessary to accomplish benefits of unified operation, and for that purpose a ⅔ assenting vote is required by Ohio law." (p. 12).

It thus appears that the Commission recognized in this case that a change from actual to legal ownership of Wheeling, where the change referred to carried with it the power to satisfy the provisions of Ohio law with respect to a possible prospective merger or consolidation of Nickel Plate and Wheeling, that did not theretofore exist in the acquirer, was a transaction subject to its jurisdiction and for which its approval was required under section 5 of the Act.

It is true, as respondents point out, that the Commission has exercised almost continuous jurisdiction over the stock of the Wheeling railroad and, further, that the Commission, in the same proceeding in which it approved the acquisition of a 47-percent interest in Wheeling on the part of Nickel Plate, ordered the shares still owned by the C. & O. and Allegheny, representing 21 percent of the voting stock of Wheeling, placed in another trust. But it is obviously absurd to contend, as respondents do, that the terminology of the Commission in approving the acquisition by the Nickel Plate of "further control" of the Wheeling in Finance Docket No. 15685 was a mere characterization of the change from pre-existing shared control by the three carriers to individual control by Nickel Plate. On the contrary, the Commission clearly approved the "further control" on the part of Nickel Plate as a jurisdictional acquisi-

tion within the meaning of section 5(2) of the Interstate Commerce Act.[29]

3. An increase in the ownership of the number of shares which transforms what constitutes *de facto* or actual control into legal control represents an acquisition subject to the jurisdiction of the Commission.

Jurisdiction in this type of situation was first upheld by the Commission in *Control of Columbia, Newberry & Laurens R. R.*, 117 I. C. C. 219 (1926). Here the applicant, Atlantic Coast Line Railroad, already owned 45.8 percent of the stock of the Columbia, and enjoyed virtual control through the cooperation of interests friendly to the applicant, who held 7.5 percent of the stock. In spite of finding that applicant enjoyed *de facto* control the Commission assumed jurisdiction and approved applicant's request for further control.

In *Dollar Lines-Purchase-United Stages System, Inc.*, 40 M. C. C. 63 (1944), Pacific Greyhound Lines, owner of 40 percent of Dollar Lines outstanding stock, sought authority under section 5 of the Interstate Commerce Act to acquire control of Dollar Lines through the purchase of the remaining 60 percent of its outstanding stock.[30] It was contended by Greyhound that it exercised exclusive actual control and management of Dollar Lines with the oral consent of the single 60 percent stockholder and that no acquisition of control was involved because the proposed purchase of 60 percent of the stock would give it no further control than that which it was already exercising.

The Commission found that Pacific Greyhound was in actual control of the company at the time of the application but rejected its argument, stating:

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[29] The application in Docket No. 15685 was made under section 5(2) of the Act. If no element of increased or additional control were involved the Commission should have dismissed the application for the want of jurisdiction and perhaps merely entertained an application to terminate the second trust to permit Nickel Plate to buy the remaining voting stock in Wheeling.

[30] This case also involved a joint application by Dollar Lines and the United Stages for the purchase by Dollar of the operating rights of United Stages.

"Apart from the question of whether or not Pacific Greyhound acquired actual control of Dollar prior to the effective date of the Act, and which question we are not now determining, these applications * * * seek our authority for acquisition of control of Dollar by Pacific Greyhound through ownership of its capital stock. Such acquisition of control clearly requires our prior authorization under section 5. In considering this proposal, we cannot overlook the fact that Pacific Greyhound at present holds actual control of Dollar * * *" (p. 70).

While the Commission disapproved the proposed acquisition on the part of Greyhound, principally because the 40-percent control was effectuated without prior Commission approval, the rule established by the decision on the jurisdictional issue involved appears sound. Greyhound was attempting to transform a working practical control into an assured legal domination of the controlled carrier. The Commission recognized that a change from actual to legal control was a substantive acquisition requiring its approval.

The Commission has required approval of increase in control in other cases involving transfer of actual control to legal control. In *Hogshire—Control—N. B. & C. Motor Lines, Inc.*, 35 M. C. C. 33 (1939), the Commission approved an application under section 213 of the Motor Carrier Act whereby Hogshire, a 33⅓-percent stockholder became a 50-percent stockholder through the retirement of 20 shares of the company's stock, leaving 40 shares outstanding equally owned. Subsequently, Hogshire sought the Commission's authority under the same section to acquire the remaining shares of stock of N. B. & C. Motor Lines. This application was likewise approved by the Commission, as consistent with the public interest, under that section. *Hogshire—Control N. B. & C. Motor Lines, Inc.*, 35 M. C. C. 487 (1940). Similarly, in *Black Hills Stages Inc.—Purchase—Black Hills Transp.*, 25 M. C. C. 529 (1939), the Burlington Transportation Company, a 50-percent stockholder in Black

Hills Stages was permitted to acquire complete control of Black Hills Stages, through the purchase of the remaining 50 percent of its outstanding stock.[31]

Respondents argue that the *Hogshire* and *Black Hills* decisions are irrelevant to the problem before us because they involve changes from shared control to individual control. It is much the same claim of inapplicability that respondents attempted to apply to the *Wheeling* case, *supra*. The argument proceeds on the premise that where several parties each own a control of a carrier, the purchase by one of the interest of another is, both practically and legally, the acquisition of "a control" by the purchaser. In other words, it is contended that the acquisition of "complete" or "further" control referred to by the Commission in these cases simply represents the acquisition by the purchaser of the remaining interests in the controlled carrier.

This is by no means so. As already noted in the comments on the *Wheeling* case, the Commission specifically treated the transfer of interests involved in this type of situation as jurisdictional acquisitions within the meaning of the statute. True, the Commission did not elaborate on its reasons for so doing. But there would appear to be no reason why an acquiring stockholder could not secure an additional *quantum* of control through an acquisition of stock from one or more stockholders of a controlled carrier rather than from the corporation itself.

4. A change from indirect to direct control through the elimination of an intermediate controlled subsidiary or through a change in the form of ownership may constitute an acquisition subject to the jurisdiction of the Commission.

Subject proceeding, of course, does not involve any change in the corporate person of either the acquirer or the controlled carrier. But this line of decisions reveals how far the Commission had gone in refusing to restrict its authority on the issue of jurisdiction under section 5

[31] Prior to the approval, the Commission had permitted Burlington Transportation to acquire control jointly with Black Hills Transportation Co. of Black Hills Stages (25 M. C. C. 171).

of the Interstate Commerce Act. It in effect placed changes in the form or character of control on par with transactions increasing the power of control on the part of an acquirer.

The leading case on the foregoing type of control situation is *Atchison, T. & S. F. Ry. Co.—Control—Santa Fe Trail Transp.*, 15 M. C. C. 469 (1938). In that case an application under section 213 of the Motor Carrier Act for approval of an acquisition of stock of the Santa Fe Trail Transportation Company was made by the Atchison, Topeka & Santa Fe Railway Company. Theretofore the railway had indirectly controlled the motor carrier through a mesne holding company, and it was desired to change the form of control from indirect to direct. The projected change was to be accomplished by the railroad's purchase of approximately 55 percent of the Transportation Company's stock from the General Improvement Company, a wholly-owned subsidiary of the railroad. The contention was made at the hearing by certain interveners that where a railroad controls a motor carrier indirectly through a subsidiary company it is not necessary that approval be given by the Commission for the acquisition of control, the argument being that once a railroad has acquired control, of whatever character, of a motor carrier, it may modify or shift the form of control without Commission approval or authorization under section 213, because it was not thereby acquiring anything within the meaning of that section. In assuming jurisdiction and approving the acquisition, the Commission took the position that section 213(a)(1) must be read as a whole. It wrote as follows:

> "It is clear that one of the purposes of the section is to make sure, if an acquisition of control is approved, that its terms and conditions shall be just and reasonable. However, if a railroad could secure approval of an acquisition of indirect control upon terms which we find to be just and reasonable, and could then, without our supervision, shift such indirect control to direct control, it could at the same time also, by means of such transaction, in effect modify the terms and conditions upon which control

> **is held. For this reason we believe that to give effect to the obvious intent of the section a change in character of control must be regarded as a transaction requiring our approval and authorization under section 213(a)(1). It is evident that otherwise a control consistent with the public interest might be so changed as to become inconsistent therewith. As a further illustration of what might happen, a desirable direct control might be shifted to an undesirable indirect control."** (pp. 471-472)

As the foregoing language indicates, the Commission has taken the position that a conversion of indirect control over a carrier to direct control may in effect modify the terms and conditions imposed in an order of approval and therefore represents a change in control subject to the Commission's authorization.

Other decisions of the Commission followed the *Atchison* case. In *Chesapeake & Ohio Railway Company—Purchase,* 261 I. C. C. 239 (1945) the Allegheny Corporation, a holding company in control of the Chesapeake & Ohio sought authority to acquire control through the Chesapeake and Ohio of the properties of the Norfolk Terminal and Transportation Co. In holding the application of Allegheny subject to approval under section 5 of the Interstate Commerce Act, the Commission said at page 260:

> "The two applications contemplate a change of existing control in that the Chesapeake & Ohio would control, through purchase, the properties of Terminal, instead of control through stock ownership and by lease, and Allegheny's control of the two companies would likewise be changed. Such 'internal re-arrangement of corporate structure' must have our approval under section 5(2) of the Act or be unlawful."

Thus, the Commission in this case recognized that while Allegheny already indirectly controlled both companies, as a result of the proposed transaction its control was to be changed, through purchase, and that an acquisition of con-

trol would take place under section 5 of the Interstate Commerce Act.

An indication of the extent to which the *Atchison* doctrine has been applied is shown in *Standard Freight Lines, Inc.—Merger,*[32] 40 M. C. C. 41 (1945). In that case Standard Freight Lines and Bates' Motor Transport sought authority under section 5 of the Interstate Commerce Act to merge the operating rights and properties of Bates into Standard. One Chaddick, who controls Standard through ownership of all its stock and who controlled Bates through ownership of 65.3 percent of its stock, filed application to acquire control of the operating rights and properties of Bates through the merger. The Commission in that case held, citing the *Atchison* case, that although Chaddick already controlled both of the carriers involved, such control is at present exercised over separate entities and the proposed merger would result in the change in the form of that control through unification of the properties in Standard. It stated at page 42:

> "The fact that the instant merger would result only in a formal change in the manner in which Chaddick exercises his control over the properties of Bates does not negative the fact that such change in the form of this control is a transaction subject to section 5, just as the merger itself is such a transaction."

Commissioner Miller dissented, pointing out that Chaddick's acquisition of control of operation rights and properties of Bates through the merger added nothing to the control which he already had over that company. The majority, however, held Chaddick a necessary party applicant in the proceeding requiring the Commission's authorization for the change in the form of his control.

The foregoing class of cases establishes that where the form of control has been altered through change from indi-

[32] For other I. C. C. cases following the theory of the *Atchison* case see: *Southern Pacific Co.—Control—Pacific Motor Trucking Co.*, 25 M. C. C. 121, 122 (1939); *Greyhound Corporation—Control—Toronto Greyhound Lines*, 35 M. C. C. 599, 600 (1940); and *Universal Cartage Co.—Control—Dixie Cartage Co.*, 37 M. C. C. 107, 109 (1941).

[2818]

rect to direct control or through a change in the character of the person or corporation holding control, the transactions are subject to Commission approval. In other words, the Commission has gone as far as to hold that certain changes in the *form* of control as well as *increases* thereof are subject to its approval.

There is perhaps another aspect of the problem here presented which bears upon a determination of whether or not the Board has jurisdiction. It concerns the power of the Board to maintain continuing authority over control relationships previously approved by it under section 408 of the Act. It is evident from the language of the *Atchison* opinion that the Interstate Commerce Commission feels it needs to maintain *continuing jurisdiction* over control relationships approved by it. The Commission acknowledged the necessity of a continuing power to enforce such terms and conditions as it might prescribe in approving an acquisition of control.

It is true that the Board advised Toolco that the transaction embodied in the letter agreement was not the kind of commercial transaction intended to be governed by the terms and conditions of the original order of approval and, accordingly, no approval by the Board of the loan or other provisions of the agreement was deemed necessary under the order.[33] But the Board further advised respondents that its advice was not to be construed as a determination that approval by the Board under section 408 of the Act was not required.[34]

The fact that the letter agreement fails directly to affect the terms and conditions of the original order of approval does not dispose of the question of the extent to which we can rely on the doctrine of *continuing jurisdiction* in the present proceeding. One approach to this problem rests on the proposition that the power to impose reasonable terms and conditions under section 408 impliedly gives the

[33] By letter, dated January 22, 1947, after both Toolco and TWA had requested approval of the transaction under the terms of the order of approval entered in Docket No. 1182.

[34] Assuming the transaction entered into under the letter agreement represents an additional acquisition of control pursuant to section 408, query, whether failure of respondents to make application for approval under that section does not constitute a violation of the Act.

Board continuing authority to prescribe new terms and conditions in the event of any material change in relationship previously approved, as well as power to see to it that the terms and conditions originally imposed are followed. There, however, may be another basis in the Act for asserting the doctrine of continuing jurisdiction.

Without exploring the several situations where an administrative order has or should have the effect of finality, it may be safely stated that the judicial concepts of *res judicata* and equitable estoppel do not ordinarily apply to administrative determinations. In the present situation, resort can be had to the statute under which the Board operates to determine the effects of decisions thereunder. Section 1005 of the Act provides grounds for vesting a continuing power upon the Board to take account of events following approval of control relationships under section 408.[35] Courts, of course, have always enjoyed the power to modify or even revoke their judgment or decree during the term of court when the judgment or decree was entered.[36] If it can be concluded that section 1005 grants the Board substantive rather than more procedural powers, then there is a considerable analogy between the control of orders by a court during the term in which they were rendered and the control by the Board of its orders at all times.[37]

[35] Section 1005(a) provides, in part, that orders of the Board "shall continue in force until further order * * *" Section 1005(d) empowers the Board "to suspend or modify its orders upon such notice and in such manner as it shall deem proper." It will be argued no doubt that the provisions of section 1005 are intended to be merely procedural. But its language may reasonably be construed as a grant of authority to change not only orders having a procedural effect but also those effecting substantive interests. Significant in this connection is the fact that the section contemplates that some changes may be made upon notice. Moreover, it seems that if section 1005 were intended only to provide a procedural mechanism for the exercise of substantive powers granted elsewhere in the Act, it would have been couched in language similar to that of section 205. There the Board is empowered, among other things, to amend orders where the amendment is deemed "necessary to carry out such provisions [of the Act] and to exercise and perform its powers and duties under this Act." No such language will be found in section 1005.

[36] *Zimmern* v. *United States*, 298 U. S. 167, 169 (1936).

[37] *Holmberg* v. *Chicago, St. P., M. & O. R. Co.*, 115 Neb. 727, 214 N. W. 746, 748 (1927); Cf. *Sprague* v. *Woll*, 122 F. 2d 128 (C. C. A. 7th 1941), cert. denied 314 U. S. 669 (1941); *Federal Trade Commission* v. *Kay*, 35 F. 2d 160 (C. C. A. 7th 1929) cert. denied 281 U. S. 764 (1930); *National Labor Relations Board* v. *Baltimore T. Co.*, 140 F. 2d 51 (C. C. A. 4th 1944), cert. denied, 321 U. S. 795 (1944).

It is next necessary to examine the present Toolco-TWA relationship to determine whether Toolco has acquired any greater control over the carrier than that contemplated by the Board's order of October 17, 1944. Obviously, if neither the letter agreement of January 8, 1947, nor any change in the aeronautical activities of Toolco since October 17, 1944, has resulted in any further acquisition of control of TWA within the meaning of section 408 of the Civil Aeronautics Act there is nothing in this proceeding for which Board approval is required under that section. However, the word "control" as used in the Act may embrace every form of control, actual or legal, direct or indirect, negative or affirmative. It also includes the power to control whether that power is currently used or can be exercised in the future.[38] Finally, irrespective of whether subject transaction has resulted in further acquisition of control under section 408, it appears appropriate to inquire whether the applicable law confers upon the Board *continuing jurisdiction* over control relationships already approved by it under said section.

CONCLUSIONS.

The record made in this proceeding indicates that there has been no significant change in the activities of Toolco in the field of aeronautics since the Board's original order of approval of October 17, 1944. While it is clear that Toolco continues as a person engaged in a phase of aeronautics under section 408 of the Act, there has been no change in its aeronautical activities since said date for which Board approval is required.

The record shows, however, that the letter agreement clearly resulted in an immediate increase in the effectiveness of Toolco's control over TWA. Following the acceptance of the letter agreement by TWA and pursuant thereto, the TWA board of directors was reconstituted. The directors who were added were all nominees of Toolco. Through the reconstituted board Toolco achieved, for the first time

[38] *Pan Am. Airways, Inc., Aerovias de Guatemala*, 4 C. A. B. 403 (1943); and cases there cited: Re the Detroit Edison Company, 7 S. E. C. 968 (1940).

since its control of the carrier was approved by the Board, unquestioned domination of the management of the carrier. There then followed significant changes in the management of the affairs of the carrier, including, among other things, a replacement of the top management of TWA, a modification of its internal organizational framework, and certain changes in the day-to-day operation of company.

There is no doubt of Toolco's desire of certain changes in TWA before injecting additional money into the carrier, and that, in the absence of the letter agreement Toolco or its representatives could not have brought about changes made prior to the date of the annual stockholders' meeting on April 24, 1947. On April 24, Toolco took steps that promised to assure it of authority to enforce its policy decisions respecting TWA operations. A new board of directors was chosen, the majority of whom were well known to the principal stockholder. The by-laws of the carrier were amended. These amendments were definitely designed to prevent any future impasse between the principal stockholder and the TWA board.

It appears certain that on April 24, 1947, Toolco could have accomplished as effective a reconstitution of the TWA board as was achieved pursuant to the letter agreement. As a matter of fact, at the April 24 annual meeting of the stockholders, called under the pre-existing by-laws, Toolco accomplished a change in the board of directors under which there exists very little probability of conflict with Toolco policy for TWA. Nevertheless, during the interim period January 9—April 24, 1947, the letter agreement made possible the unity of management control which Toolco was able to exercise over the carrier after the acceptance of the agreement. However, since all the management powers assumed by Toolco as a result of the January 9 agreement could have been exercised in any event not later than April 24, such increased or additional control as took place during this short period would hardly require approval under the Act. It would be straining the language of section 408(a) to say that this is the "control" intended to be covered by the Act. Insofar, therefore, as the letter agree-

ment of January 9 may be considered as affecting matters of management control of TWA by Toolco during the period from January 9 through April 24 of 1947, it probably did no more than to accomplish on and after January 9 what Toolco could and would have done without the agreement on April 24.

However, the $10,000,000 loan made to TWA under the agreement carries the right on the part of Toolco to have the debt retired by converting it to common stock. We have noted that this letter agreement thus gives Toolco a right to acquire up to a possible 80 percent of the common stock of TWA. This right rests solely at Toolco's option, unless bankrutcy ensues. Accordingly, it becomes necessary to determine whether the acquisition or potential acquisition, wholly on Toolco's option, of the substantially greater stock interest in TWA represented by shares acquirable through conversion of the debt has resulted in any change in the extent or effectiveness of control of Toolco of TWA.

Reference to the I. C. C. cases hereinbefore summarized reveals that where there had been a substantial increase in the extent, effectiveness or power of control through stock purchases, the additional control which resulted therefrom required approval by the Commission. This doctrine is supported by a number of the I. C. C. cases reviewed. These cases all discount the argument that where control in one form exists, a change in that control or an increase thereof need not be approved. The decisions rendered in four of the cases in particular—the *Big Four, Control of C., St. P., M. & O. Ry.*, the second *Peoria & Eastern*, and the *Wheeling* cases—have definitely established the proposition that the creation of a substantial measure of additional control in an acquiring stockholder, whose pre-existing control was for one reason or another legally incomplete, represents an acquisition subject to the approval of the Commission under the Interstate Commerce Act. Factually, as already pointed out, these cases are not "on all fours" with the instant proceeding. But the facts which grounded the decisions on the jurisdictional issue before the Commission in each of them are strikingly similar to the situation before

us and the cases are therefore authority for the doctrine that pre-existing control, unless legally complete, does not preclude an additional acquisition for which further approval is required. Moreover, the scope of the Board's dictum in the *Northeast* case plainly indicates that there can be a transaction amounting to an acquisition of control of an air carrier which must be approved by the Board under section 408 of the Act, even though the Board has approved a prior acquisition of control of such air carrier by the same person.

There can be little dispute with the proposition that "control" of a corporation means power to dictate the complete action of the corporation. Under Delaware law, Toolco, with a majority stock ownership in TWA can, alone and on its own initiative, perform such important corporate acts as amending TWA's certificate of incorporation by adding to or decreasing its corporate powers, or by substituting certain powers and purposes in place of those already present therein, or by increasing or decreasing its authorized capital stock or reclassifying it, or by making other changes or alterations in said certificate. Further, a two-thirds common stock interest in TWA, would enable Toolco, for the first time, and using only its voting power, to satisfy the provisions of Delaware law with respect to such vital matters as merger, consolidation or dissolution of the carrier. Accordingly, the acquisition or potential acquisition, wholly at Toolco's option, of a majority or two-thirds stock ownership in TWA creates in Toolco, alone, the power of change and of life and death over TWA.

We thus come to the crux of this case. It is clear that the letter agreement of January 9, insofar as it gives Toolco the option to acquire a substantially greater stock interest in TWA, thereby enabling it to execute any of the corporate activities or powers conferred by Delaware law upon a majority or two-third owner of a Delaware Corporation, represents in fact a change in the extent of effectiveness of control and constitutes in law an acquisition of control, unless it can be shown that the control approved by the Board in Docket No. 1182 was, for all purposes, complete or absolute control.

[2824]

Respondents rest their case principally upon the proposition that the Board in Docket No. 1182 approved the highest possible degree of control. They contend that the effect of the Board's order was to permit Toolco to acquire TWA common stock without any limitations as to the amount of stock, time of purchase or any other factor. In other words, it is argued that the Board's order in Docket No. 1182 approving control contemplates and covers the very type of transaction represented by the letter agreement of January 9. Respondents further contend that even if this were not true, Toolco has, after the date of the original approval of control, at all times exercised complete legal control since the total shares voted by Toolco "plus the management proxies" at each meeting have consistently constituted more than two-thirds of the outstanding stock of TWA.

To determine whether the Board intended to approve blanket, unlimited control *in futuro* by Toolco over TWA, it is necessary to examine the Board's concept of the "control" it ratified in other acquisition proceedings before it under section 408 and to analyze the language of the Board's opinion and order in Docket No. 1182.

The Board has in various acquisition cases set forth its interpretation of the word "control" as used in section 408 of the Act.[39] It has recognized that control does not connote an absolute concept; that it may apply to and cover a great variety of situations; and that it represents the amount of power and influence necessary to give its possessor substantial influence over the controlled corporation. The Board has also recognized that the *quantum* or degree of control may change. For example, in the *Northeast* case, the Board noted that the measure of control may increase. In another proceeding it recognized that changed circumstances following a period of effective control resulted in a reduction in the *quantum* of control. Thus, in the *Aerovias de Guatemala* case, the Board considered an appli-

[39] *Railroad Control of Northeast Airlines, supra; Pan American Airways, Inc., Aerovias de Guatemala, supra; Pan American Airways, Inc., Aeronaves de Mexico*, 4 C. A. B. 494 (1943); *Pan American Airways, Acquisition of China National*, 6 C. A. B. 143 (1944).

cation of Pan American Airways relating to its ownership of 40 percent of stock in Aerovias, a Guatemalan carrier. The Board found that Pan American in fact did control the carrier for a period of time. Subsequently, Pan American's holdings in Aerovias were materially reduced. This reduction in Pan American's holdings, plus other changes in the relationship between the parties, represented so substantial a change in Pan American's influence over the carrier that the Board concluded that Pan American no longer controls Aerovias. The Board clearly recognized that "control" is not a static concept. It said:

> "• • • it is apparent that where the word "control" is used in a public utility statute without any qualification or limitation, the legislature did not intend any artificial restrictions should be placed on its meaning. Thus, the existence of "control" is a factual matter to be ascertained by a weighing of all of the evidence in each particular case and the drawing of reasonable inferences and conclusions therefrom, in the light of the objectives and purposes of the statute. It is therefore important in this case, among other things, to scrutinize all of the facts and circumstances which resulted in Pan American's acquisition of 40 percent of Aerovias' stock, and to ascertain what rights, if any, such stock interest gives to Pan American in the conduct of the affairs of Aerovias. This necessarily requires a careful examination into the past and present relationship between Aerovias and Pan American, including a full inquiry into all transactions between the two companies." (page 405).

It is obvious that the Board, in passing upon an application for approval of an acquisition of control under section 408, does not concern itself with more than the specific degree of control involved in the situation before it. Ordinarily, the Board would not and could not grant approval of an acquisition *in futuro* unless the issue was raised dur-

ing the adjudication of the proceeding or at best recognized by the Board in its opinion or order. Whether the scope of approval granted in Docket No. 1182 has had the effect of approving all future acquisitions must be resolved from the action of the Board in that case.

After reciting the number and per centum of its capital stock interest in TWA, Toolco's application in Docket No. 1182 for approval of control of the carrier, requested "approval by the Civil Aeronautics Board, if such approval is deemed necessary, of *the control* by the applicant"[40] of Transcontinental & Western Air. Presumably *the control* referred to was the measure of control existing at the time of the application.

Examination of the briefs of Public Counsel and of Toolco, the report of the examiner, and the Board's opinion and order in Docket No. 1182 reveals that all parties to the proceeding concerned themselves with the control relationship *then* present. Throughout the entire proceeding, an acquisition as *of that time* was in contemplation of the parties. Thus, Public Counsel urged that "*the* acquisition of control"[41] of TWA by Toolco be approved, subject to such terms as he proposed. Counsel for Toolco spoke of the "control *here* involved"[42] in urging approval. The examiner likewise viewed the control relationship in terms of the stock interest that Toolco *then* owned in TWA. However, for the most authoritative evidence of the precise relationship approved in that proceeding resort must be had to the final action of the Board.

It is elementary that in interpreting an administrative order it is necessary to construe the order and the accompanying opinion or report as a whole. Therefore, the Board's order in Docket No. 1182 must be read in the light of the opinion upon which it was based.

In arguing that Board approval in this proceeding is not required respondents rely heavily upon the specific language used by the Board in its order of approval. Point-

[40] Paragraph 4 of application filed November 19, 1943; emphasis supplied.

[41] Brief of Public Counsel, Pages 12 and 27; emphasis added.

[42] Brief on behalf of Toolco, page 3; emphasis added.

ing presumably to the words set forth in the introductory paragraph of the order (see footnote 5, *supra*) respondents insist the Board approved "the acquisition of control, by the purchase of common stock" of TWA. And it is this language, the contention continues, which indicates an intention on the part of the Board to grant approval of unlimited control *in futuro* through the acquisition of stock.

The words of the introductory paragraph referred to are merely descriptive of the application of Toolco in that case. It is true that the Board ordered the application so described be approved. However, the terms of the order, must, as already noted, be read in the light of the Board's opinion.

The Board's opinion in Docket No. 1182 recites that "control" for the purpose of that proceeding was stipulated, and the principal issue facing the Board for decision was whether Toolco, the acquirer, was a person engaged in a phase of aeronautics, within the meaning of section 408(a)(5) of the Act. Finding that to be the fact, and together with the fact that the controlled corporation was an air carrier, and that "control" was stipulated, the Board approved the relationship subject to certain limitations relating to commercial transactions between Toolco and TWA.

The Board's opinion carefully described Toolco's history of stock ownership in TWA from 1939 to the date of the opinion, when Toolco, the Board recognized, owned 45.6 percent of the shares then outstanding. The Board's findings with respect to the control relationship involved were made in terms of the amount of stock interest *then* owned by Toolco. The Board said:

> "For the purpose of this proceeding applicant (Toolco) concedes that the stock *now owned* constituted control of the carrier. There is very little room to doubt that for all practical purposes such control has existed since the end of 1940 at least when 42.1 percent was owned. Ownership of so great a proportion of outstanding stock, the remainder of which is dispersed among many owners, represents

such a dominating influence in the affairs of the corporation that, in the absence of circumstances indicating the contrary, control either affirmative or negative, must follow. Much smaller interest have been found so to result" (*Supra*, p. 154, emphasis supplied).

After making other findings on various aspects of relationship before it, the Board concluded:

> "• • • we find that acquisitions of control of TWA by Hughes Tool through the purchase and ownership of *a stock interest* therein will not be inconsistent with the public interest" (*Supra*, p. 157, emphasis supplied).

It is clear from the foregoing that the Board did not and could not have intended complete, *in futuro* approval of the relationship between Toolco and TWA. The decision clearly relates to the *quantum* of control represented by the *then* ownership of common stock in the controlled company. Doubtless it will be argued that the Board would have used the phrase "*the* stock interest" had only the then existing stock ownership been covered by its approval. Contrariwise, it can be contended that had the Board intended approving such control as would have been covered by an unlimited acquisition of stock in the future it would have used the words "*any* stock interest". It would be possible to further play upon the words used in the order and opinion originally granted approval. Suffice it to say that the words "*a stock interest*," when read in the context of the entire opinion, clearly connote the specific ownership relationship existing at the time of Toolco's original application.

It must also be recognized that merely because the Board approved Toolco's control flowing from the ownership of 45.6 percent of TWA's common stock, Toolco need not come before the Board with the purchase of each successive share of stock. As a matter of fact, the record shows that between October 17, 1944 and June 30, 1947

Toolco made small acquisitions (and sales) of TWA stock.[43] Obviously, minor acquisitions not substantially affecting the measure of control need not have successive approvals. However, conversely, the Board's approval of a specific control relationship, upon certain facts and conditions, does not obviate the necessity of approving a further acquisition resulting from a significant increase in the extent or effectiveness of control. This position is given point by the fact that the Board has no jurisdiction over the issuance of airline securities. If the law in this regard were otherwise securities which Toolco could acquire pursuant to the letter agreement would be controlled. But the potential stock interest represented in the 10 million dollar loan to TWA is not controlled. Through this transaction Toolco has attained new and highly important substantive rights over the carrier. The transaction, therefore, has created another acquisition of control subject to the Board's jurisdiction.[44]

Let us restate the foregoing in another way. Perhaps it can be more simply expressed. To begin with, it is obvious that factually there can be more than one acquisition of control. The I. C. C. cases reviewed make that clear. The Toolco-TWA situation itself demonstrates that proposition nicely. In 1944 a 45 percent stock interest gave Toolco a certain degree of power or control over the corporate activities of the carrier. In 1947 an indefeasible option to acquire up to a possible 80 percent stock interest gave Toolco a substantially greater degree of power or control over the corporate activities of the carrier. It follows then that factually there was another, further or second acquisition of control. This is true regardless of the interpretation placed upon the original order of approval; factually, the situation before us involves a further or second acquisition regardless whether or not there legally has been such

[43] The percentage of outstanding TWA stock held by Toolco between said dates never varied more (or less) than by 1 percent from the amount held on October 17, 1944.

[44] The very fact that the Board issued its order of investigation in this proceeding negates the argument of respondents that the Board contemplated its order of October 17, 1944, to constitute an unlimited, blanket approval of Toolco's acquisition of control of the carrier.

another acquisition. In other words, there has been a further or second acquisition as a matter of fact, even if it could be successfully established that there has not been such an acquisition as a matter of law.

Now, we have seen that it is also possible to have a further or second acquisition of control as a matter of law. The Interstate Commerce Commission has so held in numerous cases. The Board said so in the *Northeast* case. To determine whether there has been another acquisition as a matter of law on the part of Toolco under the transaction of January 9, 1947, we must look to see what the Board originally approved in 1944. It is clear that it approved the acquisition that was then before it; it could not at that time have approved or reasonably anticipated an acquisition which took place some three years later. The Board's original order of approval, when read in light of the report of the case and the record upon which it was based, cannot be interpreted to have contemplated a blanket approval of any and all subsequent acquisitions. The record in Docket No. 1182 is clear to the effect that the issue of approving complete, blanket, control *in futuro* was not raised during the proceeding. Since no decision can be held to settle an issue which was never raised or recognized, the argument that the Board approved the highest degree of control must fail.

The further basis for respondent's argument that Toolco's control over TWA has not increased and cannot increase may be very briefly set at rest. It turns upon the claim that Toolco, by controlling management proxies since October 17, 1944, has, together with such proxies, had the power to take any corporate action necessary with respect to the carrier in compliance with Delaware law. An answer to this claim requires the distinction between having the required voting power under Delaware law upon the vote of Toolco *alone* as against having such power dependent upon the use of proxies to vote stock owned by others, who may not always acquiesce. Further, while Toolco has been able to secure proxies sufficient to enable it to control the day-to-day affairs of the carrier, it may not be able to obtain

that acquiescence in matters such as a merger, consolidation or dissolution of the carrier. But even if it be assumed that Toolco could at all times obtain sufficient votes to put in effect any desired corporate action, the fact remains that the letter agreement, through the retirement of the indebtedness therein created by conversion to stock, makes unnecessary any dependence upon other stock interests in TWA. Certainly, therefore, a control relationship has been established where the controlled company, which formerly responded to orders from one person with assistance from others by proxies, or otherwise, now responds or may respond to one person at its *sole* instance.

There is no doubt that an assertion of jurisdiction in this case clearly can stand on the proposition that the transaction embodied in the letter agreement of January 9 has resulted in "an acquisition" of control within the meaning of section 408. The fact that an increase in the extent or effectiveness of control over TWA is present by virtue of the terms of the letter agreement and that that increase represents a further acquisition as a matter of law are sufficient to require the recommendations hereinafter made. However, an administrative agency entrusted with the vindication of the public interest in so important and dynamic a field as civil aviation has the responsibility of asserting all such powers as the law gives it to effectuate the policy committed to its care. Accordingly, the examiner urges that the Board consider whether under the provisions of the Act it may also assert authority over the matter in issue in this proceeding on the ground that it has *continuing jurisdiction* over control relationships[44] previously approved by it under section 408.[45]

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[45] Strong support for continuing jurisdiction on the part of the Board can be found in the following statement made at the hearing by Thomas A. Slack, counsel for Toolco in this proceeding: "Of course the Board has jurisdiction. It knows it has jurisdiction. I will concede the Board has jurisdiction. The question is not whether it has jurisdiction, but whether in this case it should do anything about its jurisdiction. The Board could unquestionably enter an order and say, 'Here, we want to reopen this thing and look at the whole picture, bring that in and let us have a look at it,' but that is not the question here, whether the Board has jurisdiction. It is a question of whether it is called upon in view of the letter of January 8th to call its jurisdiction into force and to do something about it, and the two thoughts and concepts are as far apart as day and night." A similar position was taken by George A. Spater,

[2832]

It can be plausibly argued that the continuance *in the public interest* of a previously ratified control relationship *is a condition precedent* to any approval of an acquisition which the Board may grant under section 408 of the Act. There is of course an overriding public concern in seeing to it that control of an airline is not exercised in a manner inconsistent with the objectives set forth in section 2 of the Act. A person acquiring control, it may be argued, should not be allowed to frustrate the purpose of the statute by acting, subsequent to the acquisition, in a manner which would have presented approval of the acquisition in the first instance.

The foregoing is not to imply in the least that the further acquisition of control of TWA by Toolco may not be consistent with the public interest. That issue is not before us here. It is merely intended to explore the possible existence of a continuing power on the part of the Board to review a prior approval of an acquisition under section 408 in the absence of a specification in the order of approval reserving such authority.

As already noted, section 408(b) provides that the Board may impose in an order approving an acquisition such terms and conditions as it shall find just and reasonable. Section 1005(a) provides, in part, that the orders of the Board shall continue until its further order; section 1005(d) authorizes the Board to modify its orders. It may therefore be argued that sections 408 and 1005 read together, plus the implied power of the Board to require that an approved acquisition is exercised in a manner consistent with the high purposes of the Act, confers upon the Board

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counsel for Toolco in the proceeding under Docket No. 1182. In a letter addressed to the Board under the date of August 14, 1944, protesting a condition proposed by Public Counsel for incorporation into the order of approval, Mr. Spater argued that Public Counsel failed "to appreciate (1) the practical considerations involved in [that] case and (2) the significance of the continuing jurisdiction of the Board with its power to prevent any over-reaching." As to the second point, Mr. Spater said: "* * * the attention of the Board is directed to its ability to *retain continuing jurisdiction over the relationship between Hughes Tool Company and TWA*. The Board could at any time reopen the matter if changed conditions justified the action * * *" (Emphasis supplied).

continuing control of the relationships previously ratified by it and authorizes it to amend prior orders of approval to impose such new terms and conditions as it may deem necessary. Perhaps the foregoing is the rationale which prompted Toolco's counsel in the present proceeding to concede that the Board has continuing jurisdiction and which moved counsel in the original case to urge that the Board had and would retain continuing control over the Toolco-TWA relationship.

No doubt the contention will be made that the Board is foreclosed here from relying on section 1005 since the order instituting this proceeding fails specifically to state that this section of the Act is involved. But in addition to specifying the issues involved under section 408 of the Act, the Board's order of investigation of February 7, 1947, also has as one of its recited purposes the entry of "any such order or taking of any such further action as may be appropriate pursuant to the provisions" of the Act. This proceeding can therefore be treated as encompassing the question of the extent to which the Board can rely on section 1005 to assert continuing jurisdiction.

The examiner suggests that the Board has continuing jurisdiction irrespective of the existence of a further acquisition. However, since the facts and the law so clearly establish an additional acquisition as a result of the transactions embodied in the letter agreement, it is urged that jurisdiction herein be asserted on the ground that Toolco has acquired further or additional control of the carrier.

Accordingly, it is concluded that the letter agreement of January 9, 1947, insofar as it gives Toolco the right to acquire additional stock interest in TWA, thereby vesting Toolco with certain substantive rights over the carrier it did not theretofore possess, represents such an increase in the extent or effectiveness of control over TWA that it must be considered "an acquisition of control" within the meaning of section 408 of the Act.

RECOMMENDATIONS.

It is recommended that the Board find that the transactions evidenced by the letter agreement of January 9, 1947, have resulted in a further acquisition of control over TWA on the part of Toolco under section 408 of the Act. It is further recommended that a subsequent hearing be held to determine whether such a further or additional acquisition of control is consistent with the public interest and fulfills the conditions of said section 408.

TWA Brief, October 2, 1961.

[25062]

[CAPTION] 61 Civ. 2324

[TWA'S] BRIEF WITH RESPECT TO DEFENDANT TOOLCO'S CLAIMED DEFENSES

Introduction

This brief is submitted by the plaintiff Trans World Airlines, Inc. (TWA) with respect to the claimed defenses to the complaint which have been suggested or referred to by defendant Hughes Tool Company (Toolco) in the various papers filed by Toolco.

The complaint alleges a combination and conspiracy on the part of defendants Toolco (78% owner of TWA), Howard R. Hughes (100% owner of Toolco), and Raymond M. Holliday (chief operating officer of Toolco in charge of TWA affairs), and on the part of Atlas Corporation, an alleged co-conspirator, beginning in 1939.

[25063] The complaint alleges that this combination and conspiracy has thwarted the development of one of the nation's greatest national and international airlines in order that the private purposes of the defendants be served.

The complaint alleges that the private purposes of the defendants were and are so to control the acquisition of aircraft by TWA as to make it their private prerogative to determine from whom, when, and with what financing arrangements TWA could buy the planes needed to keep it physically and financially off the ground, and thus to create a private market for themselves to the exclusion of all others.

That the creation of such a private market violates the antitrust laws is clearly established, *United States* v. *Yel-*

low Cab Co., 332 U. S. 218 (1947), *United States* v. *National City Line*, 186 F. 2d 562 (7th Cir. 1951), as does boycotting all suppliers of aircraft other than defendants, *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.*, 364 U. S. 656 (1961), tying the financing of the purchase of aircraft and other matters to the furnishing of aircraft to TWA by Toolco, *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1 (1958), *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941), and the use of stock ownership to accomplish any of the foregoing, *United States* v. *E. I. duPont deNemours & Co.*, 353 U. S. 586 (1957), all of which is alleged in the complaint.

[25064] The allegations of the complaint are not controverted by any of the various papers of defendant Toolco either with respect to the first claim alleging violations of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act since 1939, with respect to the second claim alleging violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act since 1960, or with respect to the third claim alleging intentional injury to the business of TWA since 1960.

No place in the Toolco papers which have been filed is out and out violation of the anti-trust laws denied, nor intentional injury. Instead:

1) defendant Toolco invokes immunity from any and all anti-trust violations by virtue of the restricted and conditional approval by the Civil Aeronautics Board (CAB) of its acquisition of stock control of TWA in 1944 and subsequent orders entered pursuant to such approval; and

2) defendant Toolco invokes advice of counsel and alleged protection of its self-interest with respect to the rest—as if either self-interest or advice of counsel with respect thereto were an umbrella against the anti-trust laws, or an excuse for the intentional (and allegedly willful and malicious) injury of others.

[25065] The Claimed Defenses to the Complaint

The complaint has not been answered. Defendant Toolco's various papers appear to claim defenses to the unanswered complaint.

The grounds for Toolco's claim of such defenses are stated in the affidavit of Mr. Holliday (pars. 9-11) dated September 27, 1961 and in paragraph 4 of the affidavit of Chester C. Davis of August 8, 1961, to wit, exemption from the anti-trust laws by order of the CAB and from all laws by virtue of the pursuit of self-interest upon alleged advice from counsel.

The argument is also advanced that, if it is the position of TWA that Toolco has violated any orders of the CAB, then it would appear that any question as to the scope of the enforcement of such orders is a matter within the jurisdiction of the CAB and not of this Court. Mr. Davis' affidavit, however, concedes, as is the fact, that plaintiff TWA is not alleging any violation of any order of the CAB. Consequently this argument is beside the point.

The complaint of TWA attempts in no way to interfere with the regulatory authority of the CAB. TWA is complaining not of what was done or approved by the CAB, but, on the contrary, TWA is complaining of a concerted plan and purpose of defendants, which has been and is being effectuated, to injure TWA in clear violation of the provisions of the anti-trust laws.

[25066] a. What the CAB Approved.

In 1944 Toolco sought the approval of the CAB "if such approval is deemed necessary" under Section 408 of the Civil Aeronautics Act of 1938, as amended, of the previous acquisition of effective control by it of TWA through its ownership of some 45% of the common stock of TWA. The acquisition was approved in light of the "pa-

ternalistic attitude" which Toolco was found to have exhibited towards TWA, but the approval was stated to be subject to the condition, among others, that it

> "shall be effective so long as commercial transactions between TWA and Hughes Tool Company and between TWA and any affiliate or subsidiary of Hughes Tool Company are limited to transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000 * * *." 6 C.A.B. 153, 158 (October 17, 1944)

Thereafter various specific transactions between Toolco and TWA involving sums of money in excess of those specified in the above quoted condition, primarily the acquisition of various aircraft by TWA from and through Toolco, were approved by the CAB.

[25067] In 1950 the CAB approved the acquisition of further control of TWA by Toolco as a result of a letter agreement of January 8, 1947, on the ground that TWA needed the help of Toolco and that the continued interest of Toolco in TWA appeared essential to the best interests of the carrier and the public. 12 C.A.B. 192, 224 (October 6, 1950). The stock interest of Toolco in TWA was raised to its present 78% in connection with a refinancing program, approved by the order of the CAB of June 11, 1957 and involving Toolco, enabling TWA to acquire some Lockheeds and related spare parts and engines. (Order No. E-11432)

By Order of December 29, 1960 the CAB again modified its Order of October 17, 1944 restricting the commercial transactions between TWA and Toolco so as to facilitate the immediate financing of the acquisition of jet aircraft by TWA, a part of the plan of financing providing for the creation of a voting trust in respect of the stock of TWA

held by Toolco, the result of which was to transfer the control of TWA from Toolco to the voting trust. The Board stated:

* * *

[The omitted portion is an extensive quote from CAB Order No. E-16195, December 29, 1960, pp. 4-6, footnotes omitted]

[25070]

* * *

It is clear that what the CAB did approve, other than the restricted and conditional control of TWA by Toolco until the end of 1960, were specific acquisitions of equipment and other transactions submitted to it which appeared to further the interests of TWA, on the basis of the circumstances known to it, and nothing more.

b. What the CAB Did Not Approve.

What the CAB did not approve and what was never presented to the CAB are the matters alleged in the complaint.

The CAB has never required, approved or authorized any combination and conspiracy by the defendants to monopolize the supplying of aircraft in a substantial segment of the interstate and foreign commerce of the United States—i.e., that segment of commerce wherein TWA supplies from 60-100% of all air transportation provided by U. S. Flag services and/or all carriers. (Complaint, pars. 8(h), 9(d)). Nor has the CAB required, approved or authorized any attempt at such monopolization. (Complaint, par. 9(e)).

The CAB has never required, approved or authorized any combination to restrain commerce by requiring TWA to boycott all suppliers of aircraft except Toolco. (Complaint, par. 9(c)).

[25071] The CAB has never required, approved or authorized Toolco

(a) to refuse to permit TWA to employ equity financing unless Toolco could increase its equity position in TWA (Complaint, pars. 10(e), 23);

(b) to render TWA dependent on Toolco for its financing (Complaint, par. 23);

(c) to refuse to permit TWA to make any efforts itself to obtain financing for the acquisition of jet-powered aircraft during the period from 1955 until December 1960 (Complaint, par. 26);

(d) to condition all financing provided to TWA by Toolco for the acquisition of jet-powered aircraft upon TWA's acquiring such aircraft only from Toolco (Complaint, pars. 9(b), 24).

[25072] The CAB has never required, approved or authorized Toolco's sale or lease of aircraft to TWA upon the condition that TWA would not buy or lease aircraft from any competing supplier of aircraft. (Complaint, pars. 9(f), 20).

The CAB has never required, approved or authorized Toolco to become the sole source of supply of jet-powered aircraft to TWA. (Complaint, pars. 9(c), 9(f), 10(c)).

The CAB has never required, approved or authorized Toolco

(a) To divert Boeing aircraft to Pan-American (Complaint, par. 18);

(b) To divert Convair 880 aircraft to Northeast (Complaint, par. 22);

(c) To prevent TWA from making test or acceptance flights of various Convair 880 aircraft (Complaint, par. 19);

(d) Otherwise to deliberately hinder the development of TWA (e.g., Complaint, pars. 25-28).

No requirement, approval or authorization has ever [25073] been granted by the CAB with respect to any aspect of the effort of defendants and co-conspirator Atlas Corporation to foist a merger with Northeast upon TWA on terms wholly disadvantageous to TWA (Complaint, pars. 21, 47).

No act alleged as having occurred subsequent to the December 29, 1960 order of the CAB was approved, required or authorized by the CAB, and indeed all such acts can fairly be held to contravene the intent of the CAB as expressed in such order. Such acts include:

(a) The attempts to force TWA to purchase from Toolco the 13 Convair 990 aircraft on order by Toolco (Complaint, par. 37);

(b) The attempts to interfere with the Boeing contract (Complaint, pars. 38-9);

(c) The attempts to interfere with TWA's efforts to finance the Boeing aircraft (Complaint, pars. 40-46);

(d) The attempt to consummate, on terms unfavorable to TWA, the merger with Northeast (Complaint, par. 47);

(e) The attacks upon the voting trust which was [25074] approved by the CAB in its December 29, 1960 order as being in the public interest (Complaint, pars. 38, 42).

Finally, and most broadly, the CAB has never required, approved or authorized the use by defendants of TWA stock owned by Toolco to foreclose competing suppliers of

aircraft from all opportunity to supply aircraft to TWA. Nothing in the three control orders—6 C.A.B. 1953 (1944), 12 C.A.B. 192 (1950), and Order No. E-11432 (June 11, 1957)—even purports to go so far. Nothing complained of in the complaint was or is "necessary to enable" anyone "to do anything authorized, approved or required" by any of these orders within the meaning of Section 414 of the Civil Aeronautics Act of 1938, as amended.

While in 1948 the CAB noted the existence of a contractual right of Toolco to require TWA to obtain Toolco's consent before purchasing additional equipment, and was concerned by it (9 C.A.B. 381, 391, footnote 18), the CAB by no means approved the usurpation by Toolco of TWA's source of supply of aircraft, the foreclosure of competing suppliers, nor any of the other unlawful action engaged in by the defendants in violation of the anti-trust laws and to the detriment of TWA.

[25075] Whatever may be the situation with respect to the authorization by the CAB of the acquisition of control of TWA by Toolco, the Supreme Court in *United States* v. *E. I. duPont deNemours & Co., supra,* definitively held that under Section 7 of the Clayton Act an action may be brought any time stock is used to bring about, or used in an attempt to bring about, the substantial lessening of competition regardless of the innocence of the initial investment. The orders of the CAB authorizing the acquisition of control of TWA by Toolco did not in any sense even purport to exempt Toolco from the provisions of the anti-trust laws by virtue of the violations outlined above.

However, it should also be noted that since the order of the CAB of December 29, 1960 the Board has determined that Toolco no longer controls TWA and hence there can be no present claim of exemption with respect to the ownership of the stock of TWA by Toolco.

As the foregoing order of the CAB plainly indicated, various matters not presented to it for formal action had

by then come to its attention; the CAB noted a question as to its jurisdiction even to approve the affirmative plan presented without resolving it in light of the urgency of the situation; and approved the plan under circumstances which satisfied it that Toolco no longer was holding control of TWA within the meaning of Section 408.

[25076] The attempts of Toolco to subvert the authority of the Voting Trustees and to reassert control over TWA in the name of Toolco's 78% stock ownership are enough to show that Toolco is relying on no exemption from the anti-trust laws conferred by the CAB but instead upon the unbridled license the defendants have always assumed went with their initial control of TWA.

Toolco's Statement Pursuant to General Rule 9(g) of this Court

Defendant Toolco's statement pursuant to General Rule 9(g) of this Court previously filed in connection with its deferred motion to dismiss and for summary judgment purports to state material facts as to which it contends there is no genuine issue of fact to be tried. Some of these alleged material facts are irrelevant, some are obvious conclusions of law, some are obviously contested, and taken together they have very little to do with the allegations of the complaint.

Paragraph 1 states that the acquisition by Toolco of the stock of TWA which it owned was approved by the CAB pursuant to Section 408 of the Civil Aeronautics Act of 1938. In fact, Section 408 refers not to the acquisition of stock but instead to the acquisition of control which is dealt with in paragraph 2 of the statement.

[25077] Paragraph 3 states that all acquisitions of flight equipment by TWA from Toolco and the financing arrangements in connection therewith were approved by the CAB. The CAB did not, however, approve the inability of TWA

to obtain essential aircraft at the proper time, or the control by Toolco of all of TWA's financing to the clear detriment of TWA.

The assertion in paragraph 4 of the statement that the proposed merger with Northeast was subject to CAB and stockholder approval is irrelevant. Plaintiff flatly contests the assertion that said merger was not unlawful, unfair or improper.

Paragraph 5 of the statement alleges that substantial injury to the business of TWA would be injurious to defendant Toolco as a holder of stock and subordinated debt securities of TWA. Apart from the fact that this statement is a non sequitur on its face, it leaves out all the other interests, purposes and motives of the defendants with which the complaint is concerned. The stock and subordinated debt securities of TWA are a small part indeed of the Hughes empire with its interlocking and conflicting interests.

It would be difficult to find a more irrelevant statement than that contained in paragraph 6 of the statement that there has been no finding by the CAB that any of the acts of Toolco complained of was not necessary to enable it to do that which was authorized, approved or required by the orders approving its control to TWA.

[25078] Paragraphs 7 through 10 inclusive of the statement with respect to the effect of the voting trust would appear to be true enough were it not for the concerted efforts of the defendants since 1960 wholly to undermine the voting trust and the authority and actions of the Voting Trustees.

Paragraph 11 of the statement asserts that the acts of Toolco since 1960 were done in order to protect its stock and debt interest in TWA, pursuant to the advice of counsel and without a motive or desire to injure TWA. This is clearly controverted, as set forth above and below in this memorandum.

The foregoing analysis of the statement submitted in support of the deferred motion is intended simply to demonstrate the almost total lack of relationship between the purported grounds of Toolco's claimed defense and the complaint and prayers for relief with which defendants are, in fact, faced.

Argument

[25079] There is very little left for argument.

The CAB approved certain acquisitions of equipment by TWA when it was controlled by Toolco, and TWA makes no complaint of what it got—rather of what it was prevented from getting, and doing.

The CAB approved—from 1944 until December 29, 1960—control of TWA by Toolco. The CAB did not approve the abuse of that control by Toolco as alleged in the complaint. The decision in *United States* v. *E. I. duPont deNemours & Co., supra,* makes clear that the legality of stock ownership is to be judged by the use or abuse thereof established by the facts at the time of trial, lawful though the initial acquisition or acquisitions may have appeared to be.

Even were it the case, which TWA denies, that some exemption attached to Toolco's control of TWA until the end of 1960, no such exemption exists with respect to the specific acts in violation of the anti-trust laws alleged in the complaint.

[25080] This is not a case where suit is brought against persons regulated by the administrative agency involved, alleging offenses within the regulated area, as in *Putnam* v. *Air Transport Ass'n of America,* 112 F. Supp. 885 (S. D. N. Y. 1953), and *American Airlines* v. *Standard Air Lines,* 80 F. Supp. 135 (S. D. N. Y. 1948).

Here suit is brought by a regulated carrier against non-regulated persons alleging offenses outside the regulated area.

TWA Brief, October 2, 1961.

Both Toolco and TWA have previously cited and relied on the decision in *United States* v. *Pan American World Airways, Inc.*, 193 F. Supp. 18 (S. D. N. Y. 1961). Toolco's reliance is with respect to areas where the CAB had jurisdiction over the offenses charged. TWA's reliance is with respect to areas where, as here, the CAB had not exercised authority and did not have regulatory power. Nowhere in the statutes is the CAB granted power to regulate the business of the marketing of aircraft or the financing arrangements with respect thereto.

In the *Pan American* case the charge was made, and sustained, that Pan American had unlawfully stifled the growth of Panagra, Pan American's claim of immunity being rejected:

> [25081] "Pan American asserts that it is immune from antitrust violations because the Civil Aeronautics Board approved the arrangements made between it and Grace respecting the area of Panagra's operations. It points out that in 1947, again in 1950 and again in 1955 the C.A.B. approved the Through Flight Agreement between Pan American and Panagra and the related Parent Company Agreement between Pan American and Grace. It states that the approval was given after a most thorough inquiry from which it appeared abundantly clear that the Through Flight Agreement was in lieu of Panagra's coming to the United States and represented a reconciliation and settlement of the controversy between Pan American and Grace over Panagra's coming to the United States.
>
> "It relies on § 414 of the C.A.A. (49 U. S. C. A. § 494) which relieves any person affected by an order of the C.A.B. made under sections 408, 409 or 412 (49 U. S. C. A. §§ 488, 489, 492) of the operations of the antitrust laws.

TWA Brief, October 2, 1961.

"The claim of immunity is without substance because no such approval was ever sought or obtained from the Civil Aeronautics Board.

"What the Board approved was in effect an interchange agreement between Pan American and Panagra which was completely silent with respect to the problem here involved and a related management agreement which contained, among other things, a provision that Pan American would consent to a Panagra application for service to the United States in the event of transfer, modification or cancellation of Pan American's own certificate.

* * *

[25082] "Since the contracts do not specifically provide that Panagra should not seek its own certificate and the parties themselves testified that the contracts should not be so construed the Board cannot be held to have approved and granted antitrust immunity to Pan American to use its negative control over Panagra to prevent its applying to the Board for its own certificate to fly to the United States, nor has it ever approved or granted antitrust immunity in relation to Pan American's and Grace's control over Panagra. This control antedates the Civil Aeronautics Act and is beyond the purview of § 408. Exemptions from the antitrust laws are not favored and should be accorded only on a showing of compliance with the precise manner and method prescribed by Congress. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 226-227, 60 S. Ct. 811, 84 L. Ed. 1129. This has not been done." (193 F. Supp. at 45, 46)

It is thus clear that the approval by an administrative agency of only a part of a complex situation is to be

strictly construed and will not be deemed to have immunized anything else, or be taken to have purported to exercise jurisdiction over anything else.

There remains the argument in Toolco's papers filed in this action that the acts complained of after 1960 are privileged because they were done in the name of Toolco's 78% ownership of TWA and upon advice of counsel. This argument would purport to be a complete defense to the second and third claims of the complaint.

[25083] There also remains the argument that plaintiff's third claim for malicious and willful injury to the business of TWA after 1960 must fall for lack of federal jurisdiction. This latter argument may be simply disposed of.

The facts alleged in support of the third claim are identical with those set forth in support of the second claim, which is based upon federal questions under the antitrust laws, and are also the same as those set forth in the first claim since 1960, the first claim also being based upon federal questions under the anti-trust laws. Accordingly, the third claim is clearly a proper invocation of the pendant jurisdiction of the Court within the meaning of *Hurn* v. *Oursler*, 289 U. S. 238 (1933) and is properly before this Court regardless of the disposition of the first two claims. Barron and Holtzoff, *Federal Practice and Procedure*, Rules ed. Vol. 1 (1960) pp. 97-102.

The claim of privilege in the name of self-interest is similarly without merit.

TWA has alleged in its complaint that it entered into an agreement, dated April 30, 1961, with Boeing to purchase aircraft (Paragraph 35). TWA also has alleged that shortly thereafter it was negotiating with certain insurance companies and banks for the financing of the purchase of the Boeing aircraft (Paragraph 46). TWA further has alleged that the defendants interfered with such contract and negotiations by maliciously and willfully:

[25084] (a) sending a telegram to Boeing dated May 31, 1961, in which the power of the management of TWA to purchase the aircraft from Boeing and to finance such purchase was attacked as beyond the terms of the Voting Trust Agreement governing the stock of TWA held by Toolco and in which the lending institutions which were to furnish the financing were accused of having engaged in self-dealing to the detriment of the interest of TWA (Paragraph 39);

(b) notifying the various lending institutions which were contemplating the financing of the purchase of Boeing aircraft by TWA that the Voting Trust Agreement was invalid and that any financing by them would be also invalid and threatening TWA, its management, its directors and the Voting Trustees with the institution of a suit or suits against them. (Paragraphs 46, 38)

[25085] (c) making public statements to the effect that TWA was obligated to purchase certain Convair aircraft from Toolco, that the Voting Trust Agreement was entered under conditions justifying its termination and the reacquisition of control of TWA by Toolco, that it was considering an attempt to enjoin the consummation of the Boeing transaction or taking action for damages against the persons responsible for the Boeing agreements, that it had determined to sell to the public 85% of the rights to purchase subordinated debentures of TWA (with the purpose and effect of depressing the market for such rights), and that the management of TWA was acting in a manner detrimental to the interests of TWA (Paragraphs 38, 42, 44, 45).

All this is alleged to have been done in violation of Sections 1 and 2 of the Sherman Act and Section 7 of the

Clayton Act as well as intentionally, willfully and maliciously to injure TWA in violation of the law. One of the purposes of these acts was to restrain the trade of TWA with Boeing and to perpetuate Toolco's monopoly as a supplier of aircraft to TWA.

[25086] Furthermore, the fact of Toolco's 78% stock interest in TWA is far from a defense to any of the foregoing. On the contrary, it is the use of this stock ownership to control the supply of aircraft to TWA and to compel it to take unwanted equipment (Complaint, par. 37) that constitutes the clearest violation of Section 7 of the Clayton Act complained of.

None of the papers filed by Toolco controvert the above facts, except with respect to motive, and in this regard they rely only upon the asserted privilege of Toolco to do whatever it wishes to advance such interest as it may have in connection with its 78% ownership of TWA and upon advice of counsel. Neither claim of privilege, however, is valid.

To repeat, it is this very use of its ownership of TWA stock to restrain and monopolize trade in the furnishing of aircraft to TWA that mostly clearly establishes Toolco's violation of the antitrust laws, and particularly Section 7 of the Clayton Act, as alleged in the second claim of the complaint. Nothing in Toolco's papers even purports to justify this.

With respect to the third claim, it is hornbook law that [25087] it is unlawful intentionally to interfere with another's contract or business relationships with the purpose or result of inflicting actual or threatened damage. It is not even necessary that actual malice or ill will be alleged or proved. *Campbell* v. *Gates*, 236 N. Y. 457 (1923); *Hornstein* v. *Podwitz*, 254 N. Y. 443 (1930); *Advance Music Corp.* v. *American Tobacco Co.*, 296 N. Y. 79 (1946); *Munson Line* v. *Green*, 6 F. R. D. 14 (S. D. N. Y. 1946).

There is no doubt in the present case that all the post-1960 activities of the defendants injurious to TWA complained of were done with full knowledge of the circumstances and were intended to bring about the injurious results sought by the defendants in order to serve their own self-interests.

Apposite is *Republic of Italy* v. *De Angelis*, 206 F. 2d 121 (2d Cir. 1953). The facts, stated in over-simplified form were: the defendant was the controlling shareholder of a corporation with which the plaintiff had a contract for the delivery of tallow; the corporation had leased a plant from the defendant which enabled it to produce the tallow required to fulfill the contract; the defendant sold the plant, causing the corporation to break its contract with the plaintiff apparently to enable the defendant to be relieved of the contract. On rehearing the court held that these facts were sufficient to support a cause of action for tortious interference with a contract. Judge Clark in his concurring opinion articulated the reasoning of the court:

> [25088] "So it is quite clear, and often reiterated, that directors, officers, and others interested in a corporation and acting in good faith in the corporate interest are not to be held for corporate actions which may constitute breaches of contract [citations] • • • But the cases indicate their own natural limitations. Actions at variance with the corporate needs and for individual benefit are subject to the ordinary rule for tortious misconduct." (206 F. 2d at 131)

The defendants were "shrewdly acting in their own interest • • • There is no benefit to the corporation to justify these acts • • •". (*Ibid.* at 132)

The tenor of the authorities is well summed up in the following from a leading article in the field:

> "• • • [T]he corporate veil should not stand as a means of protection for those who choose to employ

> corporate power to serve their own ends. Tort liability should be swiftly imposed whenever a * * * stockholder induces a breach of contract [by the corporation] for private benefit * * *". Avins, *Liability For Inducing a Corporation to Breach Its Contract*, 43 Cornell L. Q. 55, 65 (1957)

Finally, this is not the conventional case of tortious interference with contract or business relations of a corporation by a stockholder in the sense that it is not Boeing—[25089] the third party—which is complaining, but the corporation—TWA. Whatever privilege Toolco as a stockholder of TWA might have as against a third party, such as Boeing, it has, under the present circumstances, none as against TWA. Toolco had by December 29, 1960, by its own consent and by order of the CAB, been stripped of all incidents of ownership such as its counsel now asserts.

In fact, here again, as in the case of the alleged violation of Section 7 of the Clayton Act in the second claim, Toolco paradoxically seeks to advance the very interest which most clearly shows the illegality of its actions as being in some perverse way an excuse therefor.

In the situation presently before this Court, the CAB had approved the transfer of control of TWA from Toolco to the voting trust. The complaint alleges that the defendants thereafter sought unlawfully to interfere with the actions of the Voting Trustees, the Board of Directors and the management of TWA, and to continue to protect their own self-interest to the injury of TWA. The claim that their efforts to prevent TWA from obtaining urgently needed Boeing aircraft in order to get rid of some 13 Convair 990's could in any sense have been intended for the benefit of TWA and not for their private advantage is absurd on its face.

[25090] The defendants were clearly "shrewdly acting in their own interests" and there was obviously "no benefit to

the corporation to justify these acts" (*Republic of Italy* v. *DeAngelis, supra,* at p. 132).

As stated above, neither the claimed self-interest nor advice of counsel can serve as an umbrella against the anti-trust laws, or an excuse for the intentional (and allegedly willful and malicious) injury of others.

Respectfully submitted,

CAHILL, GORDON, REINDEL & OHL
Attorneys for Plaintiff
Trans World Airlines, Inc.
80 Pine Street
New York 5, New York

October 2, 1961

[5906]

[Testimony—January 9, 1962]

By Mr. Davis:

Q Mr. Tillinghast, have you had an opportunity to collect and produce at this time the documents to which you referred this morning as the substantial material or letters you received from me or from Hughes Tool Company?

Mr. Sonnett: Those have not been yet assembled from TWA files, Mr. Davis I repeat [5907] our offer, that if you produce your carbon copies of the letters in question, we will take your word for it as to authenticity.

Mr. Davis: I have no doubt you will do that, Mr. Sonnett, but so the record is clear, and so I may get the answer to which I believe I am entitled from Mr. Tillinghast, I am not interested in the efforts of counsel in collecting, in fact, all letters he may find in TWA's files. I am interested in the documents which Mr. Tillinghast had in mind when he testified as he did.

Mr. Sonnett: I think he testified he was referring to the numerous letters written by you during the period. That means all of them.

Mr. Davis: I think that the witness ought to answer that question, Mr. Sonnett. I am not particularly interested in what you think the witness was talking about.

Mr. Sonnett: I think he has already said.

Mr. Davis: I am still not interested in what you think, Mr. Sonnett.

The Witness: Mr. Davis, let me say I am referring to all of the letters you wrote, which were very numerous and lengthy and considerable, [5908] from the period beginning about the 15th of May and continuing through the period really up to the present.

By Mr. Davis:

Q Those are the communications which you feel constitute interference by the Tool Company in the affairs of TWA?

A Oh, I didn't say that, Mr. Davis. I think some of the letters were appropriate, perhaps proper statements of position to management, and others were unwarranted interference in management of TWA.

Q Will you identify, if not by exact dates, the letters or the number of letters which you have in mind as letters which you felt constituted unwarranted interference in the affairs of TWA?

A Well, one that comes to mind specifically is a telegram that was sent to the Boeing Airplane Company. There were a number of others which, after you had made your original point, seemed designed only to coerce whoever might be susceptible to coercion into not continuing with an equipment program which the management of TWA considered to be in the best interests of TWA.

Q To the best of your recollection, Mr. Tillinghast, [5909] will you please identify those communications as best as you can by the persons to whom they were addressed, by the general subject matter of the letter, or by the date of the letter, or whatever way you can identify the letters or communications that you are now referring to?

A Well, Mr. Davis, they were so numerous that it would be difficult for me to recall—

Q Do the best you can.

A (continuing)—all of them. There was an initial communication, as I recall it, from you to the SEC, which, in my opinion, was for the purpose of preventing the taking of the preliminary steps to the effectuation of the Boeing program.

That was followed by several letters, as I recall it, some to TW-A, some to TWA, the voting trustees and the lending institutions.

Q Do you recall how many of those you are now referring to?

A Oh, it depends on how long a period you are speaking of. But for a period of several weeks there they were coming at the rate of several a week.

I specifically remember one letter that—perhaps more than one communication, in which you said that you [5910] had important technical information to submit to TWA which you thought TWA should take into account, and we had a meeting for that purpose, and at the meeting you said let's face it, you weren't here to supply technical information, and my personal opinion and judgment of that series of maneuvers was merely an attempt on your part, by one means or another, to prevent consummation of the Boeing equipment program.

Q I appreciate your judgment and your opinion, Mr. Tillinghast, but my question to you is to identify as well as you can the various letters, documents, or whatever communication you can remember or identify, in any way you can.

A Well, as I say, there was a great many of them. There was one letter which I recall—I can't recall the exact date of it, but it was in June, in which you set forth a series of, oh, alleged proposals with respect to financing.

There were three separate proposals. There were several communications during that period in which you

sought to get the voting trustees and the—and/or the financial institutions and/or the management of TWA to sit down to discuss these problems with you, and in some of which you suggested that the voting trustees should, [5911] if you will, control the management of TWA in this regard.

I am sure that if you wish to produce the letters I can identify them one by one without much difficulty.

Q I am sure of that, Mr. Tillinghast, but right now I would like you to complete your effort at identifying, with as great particularity as you are capable of, for the purpose of identifying the various letters you have in mind.

A Well, I think, Mr. Davis, that generally identifies them.

Q That is the best you can do to identify the particular documents that you have in mind?

A Offhand, yes.

Q Give it all the thought you are capable of.

A I think that is substantially all I recall at the moment, Mr. Davis.

Q You mean you are not capable of identifying or specifying these letters with any greater particularity than you have done?

A I am not able, Mr. Davis, to recite them off one by one and tell you what was in each one. You must remember that I had a great many duties, a great [5912] many functions to perform, quite apart from that of reading and replying to these numerous communications.

Q I am not asking you to describe with completeness the contents of each of these communications, Mr. Tillinghast. You understand that, don't you?

A Yes, I do.

Q I am asking you to identify as well as you can the various specific communications which you received or which came to your attention and which you feel constituted interference with you or the management of TWA.

A Well, there were—I would recall—and I am taking the period now from the middle of May to the, oh, first of July, maybe a little after the first of July—I would recall that there must have been, oh, perhaps as many as ten letters. There were also a couple of telegrams mixed in with them.

One of the telegrams I remember dealt with your alleged desire to provide technical information. There was a letter complaining about the settlement of the interest question on the subordinate debentures, which I will say, incidentally, I didn't consider an interference with management. I considered that, let's say, an appropriate statement of a position, however [5913] ill-taken the position might have been.

I think that the—if you want to know which I think involved particularly an interference with management, I would cite the communications to the Securities and Exchange Commission, the communication to the Boeing Aircraft Company, the communications to the lending institutions—

Q Which communications to the lending institutions are you referring to?

A There were several of them, Mr. Davis.

Q Which came to your attention?

A Yes. Some of them were addressed to TWA and the voting trustees and the lending institutions, and generally the volume and persistence of these communications, after the management of TWA had considered them and given a considered answer to what it considered to be in the best interests of TWA.

Q Am I to understand you correctly when you say the communications to the lending institutions, in your view, constituted interference with the management of TWA?

A Yes. I considered it an attempt to bring pressure on the management of TWA.

Q I didn't mean to interrupt you. Have you [5914] finished now identifying the documents?

A Yes. I think that's about as well as I can identify them at this point.

• • •

[6096]

[Testimony—January 10, 1962]

Q I thought that you also explained that you had very carefully studied, between March 30th and April 27th, a report of the operating personnel that included their recommendations and evaluations of the 990 aircraft.

A That's correct.

Q Are you trying to tell me now, Mr. Tillinghast, that these studies made by TWA, evaluating the advantages and disadvantages of 990 versus the Boeing, this was done without any reliable information of any kind as to the cost of such aircraft?

A It was done without any specific advice from Hughes Tool Company as to the price at which Hughes Tool Company would in fact assign these aircraft to TWA.

Q But you knew even at that time, even with your short experience in the airline industry, or with TWA, that TWA had traditionally obtained aircraft from the [6097] Hughes Tool Company at the Hughes Tool Company's cost?

A I understood that that had happened on quite a number of occasions.

Q Wasn't it your understanding that if these aircraft were, pursuant to past practices that Mr. McCone referred to, made available to TWA it would be, presumably, at the actual cost to the Tool Company, a figure which is not determinable until the aircraft are ready for delivery?

A I did not know, and had no way of knowing, in fact, at what price the Tool Company would make them available.

Tillinghast Deposition.

Q Am I to understand from your testimony, Mr. Tillinghast, that when you were discussing with Mr. McCone the advantage and lack of advantage of considering bailing out the Tool Company or the desirability of these aircraft you had no idea whatever as to what those aircraft would cost?

A That is your statement, Mr. Davis, not mine.

Q I am asking what yours was.

A No, I had a knowledge of a global figure which 990s should cost. I had no knowledge as to the terms on which Hughes Tool Company would in fact make them available to TWA.

[6098] Q But you knew that the past practice of the Tool Company had been to make them available to TWA at no more than the cost of the Tool Company?

A I knew in a general way what the past practice was, but I had no way of knowing whether the past practice would in fact be followed in the future, or, in fact, whether Hughes Tool Company would make the planes available.

Q Mr. Tillinghast, isn't it true that at that time you were concerned in pursuing a financing program with the lending institutions relating to the Boeing aircraft and that is what primarily was on your mind?

A That is not so, Mr. Davis.

Q Are you aware of the extent to which Mr. Breech consulted or discussed this matter of additional jet aircraft with Mr. Rummel?

A Except for discussions at the April 27th directors' meeting, and possibly also at the June directors' meeting, I have no knowledge that Mr. Breech ever discussed the question with Mr. Rummel.

Q Excuse me for interrupting the train of thought, but it suddenly occurred to me that since your counsel produced these two files of documents marked Plaintiff's [6099] Exhibits 1 and 2, intermingling two requests of

mine, let me go back for just a moment and ask you now to examine those two files and identify the documents which you previously testified constituted malicious and willful or other kind of interference by Hughes Tool Company or me or any representative of the Tool Company.

As before, I would appreciate it if you would clip the document so that it later may be marked for identification.

Mr. Sonnett: I think I will have to undertake to answer that question, Mr. Davis. It is argumentative.

It is the position of TWA that all communications by you and by Mr. Holliday in this connection were acts in furtherance of the conspiracy and other violations of law charged in the complaint.

Mr. Davis: I appreciate that, Mr. Sonnett.

My question is to the witness. You may direct the witness not to answer if you choose to.

Mr. Sonnett: I advise the witness that your question is argumentative, and therefore does not require an answer.

Q Mr. Tillinghast, you recall testifying, do you [6100] not, that you received and knew of communications by the Tool Company which you characterized as being unwarranted interference with the affairs of TWA—do you recall your testimony in that regard?

A I recall my testimony in that regard.

Q Do you also recall testifying that you had reference to dozens of communications and telegrams?

A I don't think I said dozens, Mr. Davis.

Q Have you finished your answer?

A Yes.

Q Without reference to the number of documents, which I believe you did testify to at one point, let me refer you to page 472 of your testimony. Let me start you, if I

may, at page 471, when there was again some discussion between counsel as to the line of that inquiry.

At the bottom of page 471 you, as a witness, said:

> "Mr. Davis, let me say I am referring to all of the letters you wrote, which were very numerous and lengthy and considerable, from the period beginning about the 15th of May and continuing through the period really up to the present."

The next question was:

> [6101] "Those are the communications which you feel constitute interference by the Tool Company in the affairs of TWA?
>
> "A Oh, I didn't say that, Mr. Davis. I think some of the letters were appropriate, perhaps proper statements of position to management, and others were unwarranted interference in management of TWA."

The next question was:

> "Will you identify, if not by exact dates, the letters or the number of letters which you have in mind as letters which you felt constituted unwarranted interference in the affairs of TWA?"

Then, if you will recall, Mr. Tillinghast, just subsequently you felt that they were, on page 473, where your answer was:

> "Well, Mr. Davis, they were so numerous that it would be difficult for me to recall all of them."

You have before you, Mr. Tillinghast, the file prepared by your counsel which purports to include all the letters and

communications which your counsel, in support of the complaint, feels constitute unwarranted interference. I am asking you to identify the [6102] communications which you had in mind when you testified as you did.

Mr. Sonnett: Are you through?

[6103] Mr. Davis: I have asked a question, Mr. Sonnett.

Mr. Sonnett: You have made various references to what TWA's counsel feels or what these files are supposed to represent in the judgment of TWA's counsel, and you are quite incorrect.

They represent an effort to assemble for you, in response to a belated request, communications from you or Holliday or others acting on behalf of Hughes Tool Company to TWA, and, I think, and I am informed, that they represent all of the written communications that we have in the files.

As to their evidentiary, significance, Mr. Davis, this is a matter that the Court is going to have to determine, and I don't propose to have you get into a debate with the witness as to what document proves what.

These are communications that you sent or received or Holliday sent or received. They speak for themselves. The best evidence of what they say is in the documents.

I don't suppose you want to quarrel with the authenticity of these copies, or of the originals, in some cases, bearing your own signature, but it seems to me you are taking an awful lot of time in nagging [6104] at a question of let's debate what the documents prove.

If you call the witness' attention to any particular document in the series of communications, you

want to ask him any questions about conferences, discussions, or whatever he did or said in response or in connection therewith, go ahead.

By Mr. Davis:

Q Do you understand my question, Mr. Tillinghast?

A Yes, I understand your question.

Mr. Davis: May he answer the question, Mr. Sonnett?

Mr. Sonnett: I don't understand the question, myself.

Mr. Davis: Will you read the question back to the witness? I know there was some lapse of time since my question.

Mr. Sonnett: You see, if you put questions without oratory we would be better off. Your reference as to what TWA's counsel intended or thought or believe or how these documents were assembled, was inaccurate. So I had to correct it.

(The question was read.)

Mr. Sonnett: I object to the form of the [6105] question and advise the witness not to answer it.

Q Mr. Tillinghast, will you identify from the material which is before you the letters or communications which you had in mind when you testified as you did at page 471 and 472 of the transcript?

A Well—

Q To avoid wasting time, you need not refer to communications which you described as being appropriate. I am interested solely in your identifying those documents which you felt were unwarranted interference in management of TWA.

A Well, Mr. Davis, let me first say this, that I think this whole line of correspondence was for the purpose and intent of interfering unduly with TWA's purchase of Boeing aircraft.

But dealing specifically with those letters which affirmatively caused interference, and leaving out the routine ones—

Q You mean routine letters of interference? I don't want you to leave out anything, Mr. Tillinghast.

A Then I will have to say, Mr. Davis, that your letter of May 16, 1961, written to the board of directors, saying that you had been retained by Hughes Tool Company in connection with its acquisition and possible distribution of [6106] debentures—

Q Wasn't that a letter by me as a member of the firm of Simpson, Thacher & Bartlett?

A That's correct, yes.

Q It was a letter by Simpson, Thacher & Bartlett to the board of directors of TWA, dated May 16th?

A. That's right.

Q That is one letter that you had in mind as being an interference with TWA—

A To the extent that it was part of an overall plan to interfere with the purchase of Boeing aircraft, although I suppose the letter, on its face, is, let us say, fairly innocuous and routine.

The letter of May 19, 1961, to the Securities and Exchange Commission, is, in my view, a clear interference with the management of TWA.

Your telegram of May 22, 1961 appears to be routine and harmless.

Q Likewise, the telegram of May 22, 1961, which merely advises of Simpson, Thacher & Bartlett's withdrawal.

Please clip those. I think it will prevent any possible error by the reporter as he subsequently marks them, so we will be sure the court record will be complete as well as accurate.

[6107] Mr. Sonnett: Let's be clear, so we don't have any further needless controversy, you are ask-

ing the witness to clip not the telegram from Simpson, Thacher advising of their withdrawal, you are asking him to clip only the ones which he characterizes as overt and clear indications of interference?

Mr. Davis: I am asking him to identify what he was referring to when he testified as he did at the parts in the record that I previously mentioned, Mr. Sonnett, and since in one of his answers he admitted that some of them were appropriate, I am telling him that I am not asking him to identify any communication which he thought was appropriate.

Mr. Sonnett: Okay. All right. Now we understand what you are supposed to do with the paper clips.

Mr. Davis: Whenever you are interested to pursue the subject as to what happened in connection with the withdrawal of Simpson, Thacher & Bartlett or my withdrawal from that firm in order to continue to represent Hughes Tool Company so as to bring out the facts, I will be very happy to pursue that subject either under oath or in appropriate affidavits to the Court.

Mr. Sonnett: Mr. Davis, I know the firm of [6108] Simpson, Thacher & Bartlett for many years, and I regard it as an outstanding and very distinguished firm.

A A letter of May 24, 1961, from Mr. Settles to Mr. Duckworth, which, on its face, is harmless, except in the light of the purpose for which it was written.

The same—well, on May 25, 1961, there is a letter to Mr. Hocker of the Securities and Exchange Commission, which I deem to have been for the purpose of delaying the effectiveness of TWA's registration.

On May 25, 1961 there was a letter from Mr. Settles addressed to me, on its face unobjectionable, except for the purpose for which it was written.

The same may be said for the second letter—I will clip the two of them together here—from Mr. Settles as of the same date.

On May 26, 1961 there is a letter from Mr. Davis to the Irving Trust Company, the Equitable Life Assurance Society, Metropolitan Life Insurance Company, the director of Trans World Airlines, and Messrs. Breech, Olds and Holliday, the purpose of which, in my opinion—the purpose and effect of which, in my opinion, was to interfere with the affairs of TWA.

There is a letter dated May 26, 1961, from Mr. [6109] Holliday to Mr. Breech, Mr. Olds and Mr. Holliday, which, on its face, appears to be harmless.

There is a letter dated May 26, 1961—

Q Excuse me. I don't think you finished your last answer.

Mr. Davis: Read back what Mr. Tillinghast said.

(The answer was read.)

Q Is that what you said, Mr. Tillinghast?

A Yes.

Q I am not asking you to identify those that you consider harmless.

A I am sorry. There is a letter dated May 26th—I will skip that.

Telegram dated May 31, 1961, from Hughes Tool to Boeing Aircraft Company.

Letter dated May 31st—it should be telegram dated June 1, 1961, from Chester C. Davis to Mr. Rowe.

Telegram dated June 2, 1961, from Mr. Holliday to me.

Letter dated June 4, 1961, from Mr. Davis to Mr. Rowe.

Letter dated June 4, 1961, from Mr. Davis to Mr. Olds.

[6110] Letter dated June 8, 1961, from Mr. Davis to Mr. Breech.

Letter dated June 9, 1961, from Mr. Holliday to me, which on its face appears harmless, and appears objectionable only so far as it is part of a plan and conspiracy.

A letter from Mr. Holliday to Trans World Airlines, Mr. Breech, Mr. Olds, Mr. Holliday, Irving Trust Company, Equitable Assurance Society, Metropolitan Life Insurance Company.

Q When you refer to Irving Trust Company, isn't it addressed to Irving Trust Company as agent?

A Yes, it is.

Mr. Sonnett: You haven't given the date.

A Dated June 10, 1961.

Q Is that what has previously been marked as Defendant Exhibit 10 as containing several proposals (handing to witness)?

A Yes.

Mr. Davis: Actually, the record might show it is addressed to Messrs. Breech, Olds and Holliday as voting trustees.

Mr. Sonnett: From?

Mr. Davis: From Hughes Tool Company, by Mr. Holliday.

[6111] Mr. Sonnett: The same Mr. Holliday?

Mr. Davis: Oh, yes.

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[6112] A A telegram dated June 20, 1961, from Mr. Holliday to Mr. Sessel, a copy of which, I think, or a telegram similar to which was sent to each of the other directors.

A letter dated June 21, 1961, from Mr. Holliday to the board of directors of TWA.

A letter from Mr. Davis to Mr. Rowe of June 21, 1961.

Letter from Mr. Settles dated June 27, 1961.

Letter of June 30, 1961, from Mr. Davis to Mr. Reed.

I think that covers the list, Mr. Davis, up to the filing of the complaint.

Mr. Davis: Will the reporter then mark all those documents identified by Mr. Tillinghast as Defendants' Exhibit 11, and each document identified with a letter.

* * *

[6119] (Letter dated May 16, 1961, to [6120] The Board of Directors, Trans World Airlines, Inc., from Simpson, Thacher & Bartlett, consisting of two pages, marked Defendants' Exhibit 11a for identification, as of this date.)

(Letter dated May 19, 1961, to Trans World Airlines, Inc., attention: Mr. Charles C. Tillinghast, Jr., president; Securities and Exchange Commission, attention: Mr. Ralph C. Hocker, from Simpson, Thacher & Bartlett, by Chester C. Davis, consisting of 28 pages, marked Defendants' Exhibit 11B for identification, as of this date.)

(Letter dated May 24, 1961, to Trans World Airlines, Inc., attention of Ronald Duckworth, secretary, from Chester C. Davis, by Arthur I. Settles, marked Defendants' Exhibit 11C for identification, as of this date.)

(Photostatic copy of letter dated May 25, 1961, to Securities and Exchange Commission, attention of Mr. Ralph C. Hocker, from Chester C. Davis, consisting of three pages, marked Defendants' Exhibit 11D for identification, as of this date.)

(Letter dated May 25, 1961, to Trans World Airlines, Inc., attention of Mr. Charles C. Tillinghast, Jr., president, from Chester C. Davis, by Arthur I. Settles, marked Defendants' Exhibit 11E for identification, as of this date.)

(Letter dated May 26, 1961, to [6121] Irving Trust Company, the Equitable Life Assurance Society, Metropolitan Life Insurance Company, the Board of Directors of Trans World Airlines, Inc., Mr. Ernest R. Breech, Mr. Irving S. Olds, Mr. Raymond M. Holliday, from Chester C. Davis, consisting of 12 pages, marked Defendants' Exhibit 11F for identification, as of this date.)

(Copy of telegram dated May 31, 1961, to Boeing Company, marked Defendants' Exhibit 11G for identification, as of this date.)

(Letter dated May 31, 1961, to Mr. Charles C. Tillinghast, Jr., from Raymond M. Holliday, consisting of two pages, marked Defendants' Exhibit 11H for identification, as of this date.)

(Copy of telegram dated June 1, 1961, to C. S. Rowe, from Hughes Tool Company, by Chester C. Davis, marked Defendants' Exhibit 11-I for identification, as of this date.)

(Telegram dated June 2, 1961, to Charles C. Tillinghast, Jr., from Raymond M. Holliday, marked Defendants' Exhibit 11J for identification as of this date.)

(Photostatic copy of letter dated June 4, 1961, to Carl Rowe, from Chester C. Davis, consisting of three pages, marked Defendants' Exhibit 11K for identification, as of this date.)

[6122] (Copy of letter dated June 4, 1961, to Irving S. Olds, from Chester C. Davis, consisting of two pages, marked Defendants' Exhibit 11L for iden-

tification, as of this date.)

(Copy of letter dated June 8, 1961, to Mr. Ernest R. Breech, from Chester C. Davis, consisting of two pages, marked Defendants' Exhibit 11M for identification, as of this date.)

(Letter dated June 9, 1961, to Trans World Airlines, Inc., attention: Mr. Charles C. Tillinghast, Jr., from Raymond M. Holliday, consisting of five pages, marked Defendants' Exhibit 11N for identification, as of this date.)

(Letter dated June 10, 1961, to Trans World Airlines, Inc., Mr. Ernest R. Breech, Mr. Irving S. Olds, Mr. Raymond M. Holliday, Irving Trust Company, the Equitable Life Assurance Society, Metropolitan Life Insurance Company, from Raymond M. Holliday, consisting of seven pages, marked Defendants' Exhibit 11-O for identification, as of this date.)

(Copy of telegram dated June 20, 1961, to Mr. Ben-Fleming Sessel, from Raymond M. Holliday, Hughes Tool Company, marked Defendants' Exhibit 11P for identification, as of this date.)

(Letter dated June 21, 1961, To the Board of Directors of Trans World Airlines, Inc., from Raymond M. Holliday, consisting of seven pages, marked Defendants' Exhibit [6123] 11Q for identification, as of this date.)

(Copy of letter dated June 21, 1961, to Carl S. Rowe, from Chester C. Davis, consisting of two pages, marked Defendants' Exhibit 11R for identification, as of this date.)

(Letter dated June 27, 1961, to Mr. Ronald Duckworth, from Chester C. Davis, by Arthur I. Settles, consisting of two pages, marked Defendants' Exhibit 11S for identification, as of this date.)

(Photostatic copy of letter dated June 30, 1961, to Mr. Francis C. Rowe, from Chester C. Davis, consisting of ten pages marked Defendants' Exhibit 11T for identification, as of this date.)

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[6820]

[Testimony—February 16, 1962]

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Q Now, let me refer you to the last item on the third page of this Exhibit 25, which reads: "Further study will be needed of the provisions which will be required covering repayments by refunding, or in the event of the termination of the voting trust."

Do you recall what you were told, or what the board was told on April 27th as to what provisions would be needed relating to the refunding of this new $150 million more or less financing, and what would happen in the event of the termination of the voting trust?

A Excuse me, Mr. Davis. Let me read this, and then I will ask to have the question.

Mr. Sonnett: I think the Special Master will notice one of the problems with the form of the questions that counsel, for example, in the preceding question said, "Does this," I assume, referring to the exhibit—it appears in the exhibit itself that Wadsworth was saying that the banks shouldn't increase their participation, although [6821] we know from what we heard, that they had to later, so this is one of the problems with the blind questions, of comparing written documents.

Mr. Davis: I am sure the witness will not give a blind answer. As I told you before, Mr. Sonnett,

any time you think it would be desirable for a short recess to permit the witness to answer completely and accurately, I have no objection.

Mr. Sonnett: A short recess if I could teach you to put a question in good form, it would be worthwhile.

The Special Master: You said the banks did increase their participation.

Mr. Sonnett: I understand they had to put up another $10 million.

The Witness: I so testified.

Mr. Sonnett: Prudential pulled out for the reasons the witness described, and the banks had to put up more money for the reasons the witness described.

The Special Master: Then the insurance companies didn't take up the amount that Prudential was going to put up.

Mr. Sonnett: They did. They put up [6822] additional money. But there again the financing is different because of that fact against what Wadsworth had in mind on the 21st of March.

The Special Master: Where did the $10 million come in if the insurance companies took up all that Prudential failed to take?

The Witness: They didn't.

Mr. Davis: They picked up all but $10 million.

Mr. Sonnett: We had a radical change in the situation. Mr. Davis is asking the witness to compare apples and oranges. There was a radical change. The documents speak for themselves.

The Witness: What is your question, Mr. Davis?

The Special Master: Read the question.

(The question was read.)

A I don't understand the part about refunding.

[6823] By Mr. Davis:

Q I assume it related to what provision would be included in the new financing which would permit TWA to refund it. Don't you think that is what Mr. Wadsworth was talking about?

A I didn't read enough of it. This may be covered more particularly in the memorandum that was submitted to the meeting. As I recall it, at this moment, the program presented to the board of directors on the 27th envisaged the right of the financial institutions to call the loan in the event of termination of the voting trust.

Q Is it your understanding that was something which the lending institutions insisted upon, or do you think it was something which was negotiated with them?

A I am not sure I see these two things as opposites. It is something they insisted on. I am sure there were negotiations with them to determine the exact nature and terms of the provision.

Q Who conducted those negotiations on behalf of TWA?

A Principally, Mr. Rowe, Mr. Leslie also.

Q Mr. Leslie also?

[6824] A Yes.

Q Who made the business decision as to whether or not to accept those terms as negotiated by Mr. Rowe and Mr. Leslie?

A Well, ultimately, the board of directors.

Q Who assumed the responsibility of making a recommendation to the board of directors as to the fairness, desirability, from the point of view of TWA, as to those terms?

Mr. Sonnett: Just so we don't get back into trouble. What terms are you talking about in your question?

Mr. Davis: The terms that the witness in his previous answer referred to that he understood the

lending institutions had insisted upon, Mr. Sonnett.

Mr. Sonnett: Are you asking whether there—

Mr. Davis: No, I am not doing that yet, Mr. Sonnett.

Mr. Sonnett: All right. I am afraid I don't follow you.

By Mr. Davis:

Q Do you follow me, Mr. Tillinghast?

The Special Master: Do you understand that [6825] question?

The Witness: I understand, I think, a question, and let me answer one. These were part of—

By Mr. Davis:

Q What do you mean by "these," because your counsel will get confused.

A These terms that you were speaking of were part of—

Q What terms are we talking about now?

A Mr. Davis, may I finish my answer?

Q Yes.

A The terms with respect to the right to call the loans in the event of termination of the voting trust, with, as I recall it, embodied in the memorandum describing the financial arrangements which Mr. Leslie from time to time presented to the board.

I believe he recommended approval to the extent that there was approval from time to time, of the proposed terms.

So far as I personally am concerned, I can't recall that I specifically discussed or took a position on this particular subject. If I did in fact take a position, it was that one

had to accept as one of the [6826] obvious facts of life that you were going to have to have some sort of provision of this type, and that financial institutions which had gone through a long and difficult negotiation just a few months before, which had resulted in the establishment of a voting trust, were not going to turn around and say "We no longer are interested."

Q Now, Mr. Tillinghast, I am going to address you as the chief executive officer of TWA, who has the primary responsibility for the management of the affairs of TWA.

Mr. Sonnett: I thought you were doing that since we started the deposition.

Mr. Davis: If I may continue.

Mr. Sonnett: You don't need the long wind-up.

Mr. Davis: At this time I want Mr. Tillinghast to appreciate that whatever assistance he had from Mr. Leslie, I want him to be conscious of the position he is in.

By Mr. Davis:

Q I want to know whether these conditions, or terms, or circumstances under which this new $150 million more or less would be callable, with terms and [6827] conditions imposed upon the TWA by lending institutions, or whether or not so far as you are concerned, Mr. Tillinghast, they were terms and conditions which you felt you had negotiated and obtained the best possible terms solely from the point of view of TWA?

A They are the latter, Mr. Davis.

Q Now, will you explain what the business decision, what considerations you gave to the desirability of having $150 million worth of debt maturing, merely because a voting trust established in 1960 in connection with the 1960 financing should terminate in accordance with its terms?

A Because we believed those were the only terms on which we could get money.

Q In other words, your answer is that the only—from the point of view of TWA—the only reason or justification for accepting those conditions as to the callability of this new money was the fact that those lending institutions insisted upon it?

A That's correct.

Q And you had no choice?

A We had no choice. If we wanted the money we had to take it on these terms.

Q Is it your view that having the possibility of [6828] $150 million worth of debt being called on relatively short notice is a handicap to any corporation, however large?

A Well, obviously, Mr. Davis, you would be better off without such a provision than you would be with it.

Q As a matter of fact, isn't it rather difficult to operate without knowing from day to day as to whether $150 million worth of debt is going to be called?

A I don't think there is a question from day to day as to whether this is going to be called or isn't going to be called.

Q Isn't it true that under the terms of the voting trust, even with the 22 per cent penalty, it was possible for the voting trust to terminate in accordance with its terms?

A Surely.

Q And in that event, the $150 million of new money would then become due and payable?

A That's right.

Q And that is an event that could occur from day to day?

A Theoretically.

Q Is it your view as chief executive officer of [6829] TWA that such a condition was most harmful to TWA?

A No, I don't think it is most harmful to TWA. I think it's more a theoretical problem than an actual one, Mr. Davis.

Q Because of the unlikelihood of the Tool Company being able to purchase the obligations underlying the voting trust?

A Because, Mr. Davis, I don't think that any large stockholder of TWA is likely to take a step which would have the effect of calling loans of this magnitude without having made some provision for their refunding.

Q In other words, you are relying on the fact that the Tool Company after this new financing was accomplished, would realize that if it made an effort to exercise whatever rights it had under the financing of 1960, TWA would be put into a serious financial condition?

A It seems to me obvious, Mr. Davis, and it has been obvious all along, that if the Tool Company is going to end the voting trust, it has got to have a re-financing plan that is sufficient and adequate for TWA.

I personally am quite prepared to take the risk that the Tool Company would be so foolish as to seek to end the voting trust without a complete financial [6830] solution.

Q To what extent did you or TWA, or any of the directors make an effort to obtain financing other than from these particular lending institutions without such a requirement?

A I personally made none. I don't know whether in the early days Mr. Leslie and Mr. Wadsworth made any or not. Having in mind that just a few months before Hughes Tool Company over a period of months had tried desperately to find some other means of financing the TWA situation without setting up a voting trust, I personally considered it very unlikely that we would be any more successful in the first part of 1961.

One has to also bear in mind that during this entire period, there has been nothing in the world to prevent Hughes Tool Company, if such other financing were available, to arrange it, and end the voting trust forthwith.

Q Is it your testimony at that time, in this period, April and May 1961, you were satisfied and became convinced that it would be impossible for TWA to finance itself without a voting trust being imposed on the stockholdings of the Tool Company?

A There was a voting trust then in existence.

[6831] Q I understand that, but I have inquired of you as to what efforts, if any, TWA made, or you had made to obtain this additional financing without a connation of the voting trust?

A I know of none. I certainly made none. So far as I was concerned, I would have considered it a rather useless exercise, if in fact such financing were available, I would have expected Hughes Tool Company to be pointing it out with some particularity.

Q You thought it would be a useless exercise to try to obtain financing of this magnitude for TWA?

A Without a voting trust.

Q Without a voting trust?

A That's correct.

Q And that is based solely upon your own personal opinions and experiences, or was that based upon anything or any fact that was called to your attention by anyone?

A That was based upon such knowledge as I had of the long and torturous negotiations that had taken place in 1960 which ended in the setting up of the voting trust.

Q And that is based upon the same conversation or reports given to you by Mr. Leslie, Mr. Rummel and Mr. Cocke, and the other people that you identified the [6832] other day as those who brought you information with respect to the past, is that correct?

A Plus what I read.

Q Plus what you had read in the press?

A Yes.

Q On that basis you were satisfied that neither the Tool Company nor TWA could have obtained financing for TWA without a voting trust?

A That's correct.

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[7092]

[Testimony—February 19, 1962]

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Q In connection with your taking the job as chief executive officer, was there any understanding, express or implied, that you would not particularly concern yourself as to the problem of financing additional jet equipment or the like?

A No, there was not.

Q At the time you were interviewed and before you made up your mind to take the job, you knew it had been a matter under discussion with the lending institutions? You were aware of that, of course, weren't you?

A You mean additional financing?

Q Yes. You remember Mr. Keehn calling you and saying, "It is not $100 million but $150 million that we are thinking about"? You were aware that there had been some discussion then with the lending institutions with respect to lending around $150 million [7093] for additional equipment?

A No, I am not sure I was. As I understood it at that time, I understood Mr. Keehn to be saying in effect that the equipment program was a $150 million program.

I didn't at that time, I am quite sure, get into any of the details of just who would supply what.

Q But on May 1, 1961, didn't you approve the action—didn't you yourself take the action of executing a contract with Boeing for some $108,500,000 worth of equipment?

A That's correct.

Q And at that time, under that agreement you were to take or come to certain steps to satisfy Boeing as to the ability of TWA to perform under the contract?

A That's correct.

Q And someone had suggested that consideration should be given to raising a part of that money, at least, through a common stock offering, rather than through borrowing?

A Mr. Davis, it wouldn't have been conceivably possible to have, starting on April 27th, to have [7094] changed this into a common stock program, and to have a common stock program finalized by May 31st. It would have been completely out of the question.

Q But on April 27th you were not yet committed to the May 1 contract, were you?

A At the April 27th meeting, the May 1 contract was authorized.

Q I understand it was authorized.

Had all of the detailed terms of the contract been presented to the board meeting on April 27th?

A My recollection is that the detailed contract stands about two inches high, and I am sure that was not all presented to the board of directors.

There was a summary of the contract at that time—a summary of what were considered to be the salient provisions of it.

Q And one of the salient provisions was that by May 31st TWA had taken certain steps to obtain adequate financing; isn't that right?

A That's correct.

Q The fact is, wasn't that one of the more salient features which were described to the board on April 27th?

A There is no question about it.

[7095] Q It was in connection with that that Mr. Slack made the suggestion that he did?

A Yes, but I might say Mr. Slack did not, so far as I recall it, make any suggestion that we change that financing that was then being talked about, and the terms of which had been agreed upon, into a common stock financing prior to the 31st of May.

Q Isn't it a fact, Mr. Tillinghast, that you were not interested in changing the arrangements that had been made to borrow this money from the lending institutions?

A Mr. Davis, in a sense it is true that I had no interest in trying to, let us say, unsettle a financing that had already been—that was already well on the way to consummation.

If the thought in fact crossed my mind, I would never have thought in terms of trying to launch and finalize a common stock financing between or in the period from April 27th to May 31st, because it would have been an utter impossibility.

I should say in this connection that going back to this time when I was back to the 6th of March, at which time in Mr. Hagerty's office there [7096] was this discussion of the need for further equipment.

One of the things that was mentioned at that time was that there was going to be a need for a further short-range program, for which it would be necessary to have equity financing, because it would not be feasible to add a short-range program, a third phase program, without substantially broadening the equity basis of the company.

When this question of a stock offering came up, it was in my mind a matter of something that would support a third phase short-range program, and not something that was necessary to accomplishment of the second phase program, which is the 26 Boeing 707s.

[7097] Q Who had insisted on this May 31st date in Boeing contract?

A Boeing had.

Q Who negotiated that aspect of it?

A Mr. Rummel, I believe.

Q You mean Mr. Rummel was the one who negotiated with Boeing the time limit within which TWA would obtain financing satisfactory to Boeing?

A That's correct. We had two problems with Boeing. One was a price problem. The other was a delivery problem. Boeing, if I recall correctly, had agreed to maintain the prices and the delivery dates to the 30th of April, and indeed, the actual finalization of the contract took place on Sunday, the 30th of April.

We were faced with a price increase on either the 131 or the 331—I can't remember at this point which—subsequent to April 30th. Out of the discussions and the position taken, I believe, by Mr. Rummel that we couldn't possibly move that fast, there was evolved an agreement pursuant to which we had until the 31st of May to exercise an out, subject to forfeiture of $850,000.

That was the whole reason for the April 30th [7098] deadline for signing, and the May 31st deadline for closing up the financing.

Q Did you give any guidance or approval, or make any effort to obtain from Boeing more time than that 30-day period?

A No. As I remember it, Mr. Davis, this was very far down the road when I came on the scene. As I recall my discussions with Mr. Rummel, Boeing was quite adamant if we wanted delivery dates at the time that was being talked about, that we had to act by the time in question here.

I believe also Mr. Rummel told me that from a production standpoint, that he thought that this was a very tight schedule, and that in fact, it was unlikely that Boeing could substantially telescope it.

Q When you said the thing was pretty far along when you came into the picture, are you referring to the financ-

ing program, the Boeing contract, or what was pretty well along?

A Both.

Q Had been pretty well along by the time you became chief executive officer?

A That's correct.

Q Isn't it a fact, Mr. Tillinghast, that the [7099] financing arrangement that was made was not actually made until August 1st, was it, 1961?

A Well, the financial arrangements, I believe, were signed up—all the paperwork was finally finished some time in the middle or latter part of August, and there was a modification of the financing program at some time before the end of July or the first part of August. I can't give you exact dates at the moment.

Q I thought you were looking for a date. Have you finished your answer?

A Yes, I have.

Q Who understood the job of getting Boeing to consent to the extension from May 31st to August, whatever date?

A Boeing didn't consent to any extension.

Q My understanding of your testimony is that in fact the financing arrangements required of TWA by the Boeing contract were not consummated until some time in August.

A The contract provided—and I can't remember the exact words, but the contract will show—that we had until the 31st of May to satisfy ourselves that satisfactory financing had been arranged.

Q Satisfy TWA?

[7100] A Satisfy TWA. There was also a provision, the effect of which was a little cloudy, that Boeing had until the 31st of May to satisfy themselves. In the event that we didn't satisfy ourselves as to the financing, there was a specific termination provision.

Q You had an option to cancel?

A That's right.

Q And lose your $850,000 down payment?

A That's correct.

Q And if Boeing was not satisfied?

A The contract was signed, and whether or not they had a right to terminate, as I recall it, was a slightly muddy question. In any event, neither Boeing nor TWA exercised such right as it had to terminate, so that the contract became firm at the close of business May 31, 1961.

Q Then on April 27th the problem confronting you was merely to satisfy yourself before May 31st that a financing program was feasible, and you were under no compulsion to complete the financing arrangements by May 31st, is that correct?

A That's correct, yes.

* * *

[7478]

[Testimony—February 27, 1962]

* * *

Q At the moment I am interested in pursuing your effort at identifying anyone who represented TWA or spoke on behalf of TWA other than Mr. Taylor who discussed or approached the CAB for the purpose of discussing the possible merger or the problems in connection with the possible merger or the desirability or lack of desirability of the merger between Northeast Airlines and TWA.

A I can't think of anyone, Mr. Davis.

Mr. Davis: May I have these photostatic copies of letters marked for identification as Defendants' Exhibit 33.

* * *

[7480] Q You can identify this, can you not, Mr. Tillinghast, as a letter by Mr. Crimmins of the Chadbourne

firm as counsel for TWA addressed to an examiner of the CAB relating to the Northeast Airlines application for certification of its route to Florida (handing to witness)?

A I don't recognize the letter, Mr. Davis. I have no reason to believe that it isn't what it purports on its face to be, but I have no independent recollection of having seen it before.

Q You see paragraph 2 of that Exhibit 33, which reads:

> "Northeast's authority south of New York should be renewed as part of a merged operation and TWA is the only logical candidate for such a merger."

A That is correct.

Q Was that statement or representation made to the CAB without your knowledge, acquiescence or authorization?

A Oh, no. I was quite aware that this position was being taken.

Q And you discussed it with personnel at TWA?

A I believe—well, I am sure I discussed it with Mr. Taylor, and undoubtedly I discussed it with some [7481] others as well, although I don't at the moment recall discussions with other than Mr. Taylor.

Q Did you discuss it with Mr. Leslie, Mr. Rummel, Mr. Cocke?

A I doubt that I discussed it with Mr. Leslie, because this wouldn't fall—well, let me withdraw that.

It may be that this was discussed generally in a management policy committee meeting, but I am quite sure that I discussed it with Mr. Taylor even apart from a management policy committee meeting. I very likely discussed it with Mr. Cocke and Mr. Rummel, possibly with Mr. Hall.

Q Did you discuss it with any members of the board of directors?

A I don't recall that I discussed it with members of the board, and I rather doubt that I did.

Q When I am asking if you discussed it with members of the board or others at TWA, I am not referring merely to the language of this letter, Defendants' Exhibit 33. I am referring to the subject as to the fact that TWA was the only logical candidate for a merger with Northeast Airlines.

A I am not referring either, Mr. Davis, to just the language. I am referring to the substance of this.

[7482] Q Mr. Crimmins was authorized to make this representation to the CAB?

A That is correct.

Q And correctly reflected the views of the management of TWA?

A Well, it correctly reflected the views of the management of TWA as to the position which TWA proposed to take in the New York - Florida renewal case.

Q I don't understand the qualification, if you intend it as a qualification.

A We were stating, Mr. Davis, a legal position, and this is the legal position that we stated.

Q I don't understand what you mean by "a legal position."

You mean the statement in paragraph 2 that the only logical candidate for such a merger is Northeast and TWA —that is a statement of a legal position?

A This whole letter is a statement of a legal position.

Q I am referring to the statement appearing in paragraph 2.

A That is the statement of a legal position.

Q You mean it doesn't purport to reflect what TWA's management believed was a logical merger between [7483] the two airlines?

A That is, in part, true, Mr. Davis. We were, as I recall the circumstances at the time, in a somewhat difficult position. At this point there was still some very substantial possibility that if appropriate terms could be arranged that we would pursue a—pursue the carrying out of a merger with Northeast. We wanted to take a position in this New York-Florida renewal case that would leave us in a position to pursue a Northeast merger if appropriate terms could be worked out, and also leave us in a position, in the event that it wasn't possible to work out a Northeast merger, to argue that a Florida route ought to be given to TWA, and this document is, I believe, a formal statement of our position in this proceeding.

• • •

[Testimony—July 26, 1962]

[11785]

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The Special Master: I will sustain the objection at this point, and permit you, Mr. Davis, to inquire [11786] further as to whether these documents, all of them in Exhibit 11, constitute the demands, or whether certain specific documents constitute those demands.

By Mr. Davis:

Q Mr. Tillinghast, referring to your prior answer, are there some particular documents which have been marked as Defendants' Exhibit 11A through T which constitute the demand claimed to have been made by the defendants?

A Well, Mr. Davis, as I recall the documents in Exhibit 11, there are some that specifically refer to this subject. However, I think the net effect of the whole group

of documents was to make it very evident to the management of TWA that Hughes Tool Company was seeking to exert all sorts of pressure on TWA for the purpose of bending TWA to its wishes, and I don't think that one can look solely to the documents that mention this subject to discern the pressure, one has to look at the whole course of conduct.

Q Previously this morning I referred you to Defendants' Exhibit 11F, being a letter by me dated May 26th, and I asked you to read paragraph 4, and directed your particular attention to the last paragraph on page 10, which refers to the TWA-Northeast merger.

Is Defendants' Exhibit 11F one of the documents that [11787] you have in mind as making a demand?

A It is.

Q Is it also one of the documents or course of conduct exercising pressure on TWA?

A It is.

Q Can you recall any other documents which refer to the Northeast merger?

A I believe there is another one, Mr. Davis. I think one of the earlier—

Mr. Williams: You mean one of these documents in Exhibit 11?

Mr. Davis: Any that he can think of.

Mr. Williams: That refers to the Northeast merger? There are hundreds of documents in evidence.

Mr Davis: I will be glad to have you testify, if you want to, Mr. Williams.

Mr. Williams: My recollection, while I have been here, is that there are a number of documents which you have introduced referring to a Northeast merger.

Mr. Davis: Now I am asking the witness if he can identify any other document which he claims constituted a demand or the exercise of pressure on TWA.

A Well, I would say all of these documents that I [11788] have referred to constitute the exercise of pressure on TWA, Mr. Davis.

Q Relating to the Northeast merger?

A Relating to anything that TWA—that Hughes Tool Company was demanding of TWA.

Q But I am trying to get you to refer to documents which constituted a demand upon TWA or exercised pressure upon TWA for the consummation of a merger on terms previously directed by the defendants.

A Mr. Davis, I—well, so far as pressure is concerned, I will have to repeat what I just said.

So far as demand is concerned, I was under the impression, it is my recollection, that there were two letters in which this subject had been touched on. Perhaps I am wrong, and there is only one. But I could check to see whether my recollection is faulty in that regard.

Mr. Williams: Maybe counsel sent us an earlier draft.

May we take a recess, sir?

Q Have you completed your answer now?

A Yes, I have.

Q That is the best answer that you can give me at this time?

A It is the only answer I can give you, Mr. Davis.

[11789] Mr. Davis: All right.

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[11791] Examination (cont'd) by Mr. Davis:

Q Mr. Tillinghast, just before the luncheon recess you were examining the list of documents which had been marked as Defendants' Exhibit 11, for the purpose of refreshing your recollection, if possible, as to whether or not you could identify other documents as ones which referred to the Northeast merger, and which you claim constituted either a demand on TWA or pressure on TWA for acceptance of a Northeast merger on terms previously directed by the defendants.

Can you now identify any one of those documents, other than what has been marked as Defendants' Exhibit 11F?

A No, I cannot, Mr. Davis.

Q Have you had an opportunity to review the list of those documents which have been marked as Exhibit 11?

A I have had an opportunity, Mr. Davis, but I haven't reviewed them.

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[11792] Q Can you identify what has been marked as Defendants' Exhibit 102?

A No, I have never seen this before, Mr. Davis.

Q Can you identify the handwriting?

A No, I cannot.

Q You have read the entire document, have you not?

A I have just read it, yes.

Q It does not refresh your recollecti in any way?

A No, I am sure I have not seen it before.

[11793] Q Does it refresh your recollection on what you may have been told by other officers of TWA?

A No, it doesn't refresh my recollection in any way.

Q You see under the heading "Conclusions" there appears "Unanimous support of subcommittee and special committee" at the bottom of the first page?

A Yes, I see that.

Q You cannot identify the subcommittee or special committee referred to?

A I cannot identify it.

Q At the top of the next page, "You know the board of directors at its meeting on May 13th gave preliminary consideration to the proposed Northeast Airlines and TWA merger in which TWA would be the surviving corporation."

Do you have any knowledge as to such meeting of the board of directors?

A Well, it wasn't May 13, 1961, Mr. Davis, because the 13th of May in 1961 fell on a Saturday, and I am positive that the board of directors of TWA didn't meet on any Saturday subsequent to the time that I became president of TWA. What year this was, I don't know.

Q It may have been May 13, 1960?

A Or 1959—1959 or 1960, I guess.

Q Is it your understanding that the Northeast-TWA [11794] merger was under discussion in 1959?

A I don't know just when the discussions started, Mr. Davis. I don't recall at this time. I know it was under discussion in 1960, and whether this refers to 1960 or 1959, I wouldn't be absolutely sure.

Q "At that meeting we had a preliminary report presented by Mr. Leslie, and this was favorable."

Does that refresh your recollection in any way of a conversation with Mr. Leslie or others?

A No, this doesn't refresh my recollection at all, Mr. Davis.

Q Mr. Leslie never mentioned that?

A Never mentioned what?

Q What is referred to in the sentence that I just read to you. You don't know what that refers to?

A I don't know what that refers to so I can't answer whether Mr. Leslie ever referred to that or not.

Q The next thing read:

"As a result the board appointed a special committee of Messrs. Pierson, Cocke, Leslie, Holliday and myself to have prepared a full-scale review and study of the proposal and presented at this meeting."

Did you ever hear of the special committee consisting of those people?

[11795] A No, I wasn't aware of that special committee.

Q Do you know who "myself" refers to?

A I don't know, but I can speculate.

Q I don't know what you mean by speculating. Do you mean you have an idea or understanding as to who it might be?

A Only from reading this memo.

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[11798] Q Will you look at the next paragraph in this document, Mr. Tillinghast:

"This special committee first established several working subcommittees consisting of members of TWA's management and specialist in each area."

Do you have any information whatever as to subcommittees or working subcommittees established by a special committee of TWA, or consisting of members of TWA's management, being specialists in various areas?

A No, I do not, Mr. Davis.

Q The next sentence reads:

"We met with the subcommittee several times, and on Friday, June 24th it presented its final [11799] draft."

Have you any knowledge or information from any source as to any meeting with the subcommittee there described?

A No, Mr. Davis. That was long before I was associated with TWA.

Q You are sure of that now, are you?

A I am sure this didn't happen while I was president of TWA.

Q My question, you understand, any information you obtained from any source, from anyone.

A Yes, I understand your question, and the answer remains the same.

Q You have no information whatever that such a subcommittee was formed, or that it had met with anyone; is that correct?

A I have no knowledge beyond what I read right here.

Q You see the next to the last paragraph which reads:

> "I appointed Mr. Huntington to coordinate the activities of the special subcommittees."

Mr. Huntington is still with TWA, is he not?

A He is.

Q He is one with whom you have conferred frequently with respect to the desirability or lack of desirability of a Northeast merger; isn't he?

[11800] A He is one with whom I have consulted frequently in recent months on that subject. He is not one with whom I consulted frequently prior to 1962.

Q Is Mr. Huntington one who made various studies at your request involving a merger of Northeast Airlines and TWA, and other airlines?

A Mr. Huntington, since I don't know when, I guess about the first of this year, has been charged with responsibility for conducting a variety of merger studies, and in that connection he has made a number of studies of Northeast.

Q In connection with those discussions that you have had with Mr. Huntington, did he ever attempt to describe

to you in any way what had taken place prior to your tenure as chief executive officer, relative to a Northeast merger with TWA?

A Not in detail, Mr. Davis. I have discussed with him a couple of times the report that he had made on TWA sometime back, but I have not had occasion to question him in any detail as to the series of events or happenings that took place in connection with the consideration of the possible Northeast merger prior to the time that I became associated with TWA.

Q My question is: I didn't ask you to describe [11801] any particular detail or describe any series of events, Mr. Tillinghast. I am asking you whether or not Mr. Huntington at any time, in a general way or in detail, described to you the circumstances under which he had made prior studies?

* * *

A I don't recall, Mr. Davis, any description by him of the circumstances under which he made prior studies. I know, I think partly from discussions with him, that he had been in charge of coordinating a Northeast study made in 1960. I have read the study. I have discussed its conclusions very broadly with him, but beyond that I don't think that I have had any discussions of the circumstances under which the study was made.

Q Do you know who appointed him to coordinate such [11802] activities relating to this Northeast merger?

Mr. Zeller: I object to the form of the question. It assumes someone did appoint him, and all he has is this anonymous document.

By Mr. Davis:

Q Do you know if anybody appointed him?

A I assume, Mr. Davis, he was appointed by Mr. Thomas, who was chief executive.

Q What is the basis for that assumption?

A He worked for Mr. Thomas. He was Mr. Thomas' assistant.

Q Did Mr. Huntington ever tell you that Mr. Thomas had assigned that particular task to him?

A Mr. Davis, I don't know whether he ever did or not. That is something I would not particularly remember. He may have. I have no doubt that Mr. Thomas was the one who appointed him to whatever responsibilities he had in this regard.

Q I recall your prior testimony to have been that this Northeast merger with TWA had been undertaken without the knowledge or consent or acquiescence of Mr. Thomas. Am I correct now in understanding your present testimony that it is your understanding that if not Mr. Thomas, his assistant had undertaken a study in 1960?

[11803] A Mr. Davis, you are talking about two different things, if I may say so. It is still my testimony that I recall this deal had been cooked up before Mr. Thomas heard about it. After Mr. Thomas heard about it, it is my understanding that he insisted on studying the matter, and it was after that that the TWA studies on the subject were made.

Q What is the basis for the belief that you have just expressed in your answer?

A I have been so told.

Q By whom?

A Partly by Mr. Rowe. Perhaps partly by Mr. Huntington. I am trying to recall. I am a little hazy, Mr. Davis, as to how this information came to my attention, but I think it did.

Q Do you recall being so told by members or associates of the Cahill firm?

A Possibly, but I have no particular recollection of any particular instance.

Q Don't you recall meetings and conferences with them relating to the facts underlying the serious question as to the existence of a conspiracy relating to a TWA-Northeast merger?

Mr. Zeller: I object to this. It is getting [11804] into conferences between attorney and client, and as such is getting into privileged material.

The Special Master: I don't think this question reaches that far. You may answer this question.

Mr. Zeller: I realize this calls for whether there were such conferences.

The Special Master: Yes.

The Witness: Would you read the question back?

(The question was read.)

A Yes, I had some conferences.

* * *

[11841] Q Will you take a look at what has been marked Defendants' Exhibit 4, which is a calendar that was kept by your secretary, Mr. Tillinghast? Will you now look at the month of June? First, will you look at the entry under date of Wednesday, June 7th. Do you see there at 2:30, "Cahill, Reed, Rowe"? Do you recall having a meeting with Mr. Cahill, Mr. Reed and Mr. Rowe at about that time?

A I remember that I did have a meeting, I believe with Mr. Cahill, Mr. Sonnett, Mr. Reed and Mr. Rowe.

Q What was the subject matter of that meeting?

(Mr. Hupper entered the hearing room.)

A Mr. Davis, before I answer that question, let me straighten out something else, if I may, because I have been a little confused in my testimony here. I think that the Waldorf meeting which I recall was a meeting of the

stock option committee, which I see in my secretary's calendar, at the Waldorf on Tuesday, May 16th.

Q Tuesday, May 16th?

A Yes. I think perhaps that is the meeting that I [11842] had in mind, although I am not absolutely sure.

Q That was a meeting at Room 36-H of the Towers, at the Waldorf. I understand there was a meeting of the stock option committee on that date. But what has that to do with a meeting with Mr. Breech, Mr. Hood, Mr. Leithead, Mr. Cahill and Mr. Sonnett and Mr. Reed?

A I think perhaps that is the meeting which I have in mind.

Q The meeting which you previously identified as having taken place in the Waldorf involving Mr. Cahill and Mr. Sonnett and Mr. Breech and Mr. Hood and Mr. Leithead, you now believe took place on Tuesday, May 16th; is that correct? Is that your present testimony?

A When I said, Mr. Davis, that I thought it was a meeting of the audit and compensation committee, I think maybe I was thinking of the stock option committee, and I think this was the meeting.

Also looking at this, however, I notice that on the 12th of June there is an entry here, "4:00 p.m., Waldorf, directors meeting."

Possibly that is the occasion I am thinking of. I am just not clear in my mind.

Q You understand that I am not particularly concerned as to whether or not this meeting with Mr. Cahill and Mr. [11843] Sonnett at which the complaint, or their investigation was discussed, was in connection with a meeting of the stock option committee or the audit and compensation committee?

A I appreciate that.

Q Will you now answer my question with respect to the meeting of Wednesday, June 7th?

A All right, we will come back to Wednesday, June 7th.

Q Where the calendar of your secretary indicates that you had a meeting with Mr. Cahill, Mr. Reed and Mr. Rowe.

A If you will bear with me just a minute, Mr. Davis, while I look back here and try to refresh my recollection a little bit, maybe I can get that straightened out.

Mr. Davis: May I suggest while the witness is orienting himself with the calendar, Mr. Zeller can confirm whether or not Mr. Reed has been found in his office.

The Special Master: It may be that the facts are so overwhelming from some of these documents, that we can get it clarified without any further help from Mr. Reed.

Mr. Zeller: So far as this particular meeting is concerned, I don't have any objection, and I have interposed none to Mr. Davis asking about what trans- [11844] pired at that meeting.

Mr. Davis: We will come to that.

The Witness: Mr. Davis, it is my recollection that at this meeting we had a general discussion of the conclusions to which Mr. Cahill and Mr. Sonnett were in the process of coming, so to speak. As I recall it, Mr. Cahill or Mr. Sonnett, and I can't recall at this juncture just who did the talking, said that they had by no means completed their investigation, but they had come to some tentative conclusions.

The conclusions were that rather than to become involved in the details of an equity action involving possibly multiple assertions of wrongdoing, which would involve considerably more factual investigation and determination of detail which they had not had an opportunity to pursue, they felt that they

very likely would recommend to TWA the institution of an antitrust action, based upon the fact that Mr. Hughes had preempted to himself the procurement of planes and the financing of TWA's operations.

They said, as I recall it, that they had talked with Mr. Thomas in California, and that he seemed most reluctant to talk very freely, but that out of [11845] those discussions some things had appeared very clearly.

Among those were the fact that when he had taken over as president of TWA, there had been an understanding between him and Mr. Hughes that he was to have nothing whatever to do with the procurement of equipment, nor the working out of financial arrangements of the company, nor with advertising, all of which Mr. Hughes was keeping to himself.

They said that they felt it was clear that in these—

By Mr. Davis:

Q Excuse me, but when you said "they said it was clear," I would appreciate if you would identify who "they" is.

A Mr. Cahill and Mr. Sonnett. That Hughes had preempted these areas to himself. They said they also thought it was clear that TWA had suffered very substantially from the delay in getting equipment, and that they had received from both Mr. Leslie and Mr. Fellows separate estimates that TWA had been damaged by this to the extent of approximately $35 million.

They had said, as I recall it, or Mr. Sonnett said this, I am quite sure, that he felt as he looked at [11846] this situation and saw the dispute that had come up over the

Boeing acquisition and the pressures that the Tool Company had brought to try to interfere with that, that there wasn't likely to be any real solution to this problem, short of a divestment of Hughes' interest in the airline.

He said, if I recall correctly, that when the voting trust was set up, people felt that at last they had this problem solved and had stability, and then it was just a matter of time before another controversy arose.

He said, "I think you have to face the fact that it is very unlikely that you will ever be free of controversy, so long as this relationship exists, and for that reason he thought a divestment proceeding was what was really needed in order to solve the problem.

He said that it seemed abundantly clear that TWA was too large and too important to its stockholders and employees and the public to be the plaything of an eccentric man, and that he felt that in the last analysis a Court would come to the conclusion that a continuation of this relationship was just inconsistent with the public good and with the good of others having a legitimate interest in the company.

I remember he referred—

[11847] Q "He" being who?

A I believe this was Mr. Sonnett—to the then fairly recent decision in the Panagra case, and he also referred to the duPont decision.

Mr. Rowe, I recall, raised the question as to the effect on any action of this sort, of the fact that certain of these things had in a sense been submitted to the Civil Aeronautics Board and approved as specific transactions.

To that Mr. Sonnett said, if I recall correctly, he felt that the Panagra case established beyond any real doubt that if there was an underlying antitrust situation, the approval of specific transaction done pursuant to the conspiracy which in and of itself might be legitimate and

proper would not save the conspiracy from being the subject of judicial action.

As I remember it, and I can't remember everything that was said on the subject, a large part of the discussion revolved around what I will refer to as the CAB question, and what the effect of the CAB action was, both as it related to Section 7, and as it related to the question of an antitrust conspiracy generally.

That is as much as I remember at the moment, Mr. Davis, although undoubtedly there were a good many other [11848] things said.

Q You have referred to the conspiracy in one of your statements. You said "Pursuant to the conspiracy, CAB approval would not affect something done pursuant to the conspiracy."

What conspiracy was described or identified in this conference?

A This conspiracy to monopolize the procurement of planes, and the financing of TWA.

Q Did anyone there identify who the conspirators were?

A I don't particularly recall at that time, Mr. Davis, any great discussion of that, other than Hughes and Hughes Tool Company.

Q Maybe there wasn't a great discussion of it, but will you please give me your total recollection as to anything said which identified the conspiracy, as to who the conspirators were, or were claimed to be?

A I don't recall any specific discussion about it, Mr. Davis.

Q Did you understand what Mr. Cahill or Mr. Sonnett or Mr. Rowe were talking about when they referred to this conspiracy?

A I think I did.

[11849] Q What was your understanding as to what they were referring to?

A I understood that they were referring to—I don't know just how to express this without stating it as a legal conclusion—but I understood they were talking about a conspiracy between Howard Hughes and the Tool Company and Raymond Holliday.

I frankly can't recall at this time how much discussion there was of Atlas Corporation, and I am inclined to think that there was very little discussion of Atlas Corporation at this particular time.

Q At the moment I am not referring to the alleged conspiracy involved between the Northeast Airlines and Atlas Corporation. I am interested in your testimony of the effect of this conspiracy to CAB approvals. I am referring to that part of your testimony which related to this effort to pre-empt the procurement or financing of aircraft.

Is it your understanding that what they were discussing was a conspiracy between Mr. Hughes and the Hughes Tool Company and Mr. Holliday?

A That's correct.

Q Was there some discussion at that meeting as to whether or not that would be sufficient to establish a [11850] conspiracy? Can you tell us what was said that identified the parties to this conspiracy?

Mr. Zeller: There are two questions there, Mr. Davis. Which do you want answered?

Q Answer one at a time, then.

Mr. Zeller: Let us have the first one.
(The question was read.)

Q Was there any discussion as to whether or not a conspiracy between a 100 per cent stockholder or president of the corporation, with its corporation, and other officers of the corporation was sufficient to meet the test of the conspiracy?

A I don't remember any, Mr. Davis.

Q Do you recall any discussion as to who were the various persons or parties who might be named as part of this alleged conspiracy?

A I don't recall it at that time, no.

Q Do you recall it at some subsequent time?

A I am not altogether clear, Mr. Davis. I have a feeling that there was some discussion. I think that there was a discussion at a subsequent meeting as to the inclusion of other parties.

Q When was that other meeting and discussion?

A. One occasion was, I believe, the meeting after [11851] the board meeting on June 21st.

Q What is your present understanding as to the persons involved in this alleged conspiracy relating to the pre-emption of the procurement or financing of aircraft?

Mr. Zeller: I object to that. This is a conclusion which can add nothing to Mr. Davis' factual investigation—what the witness' present understanding is.

Mr. Davis: As to who the persons to a conspiracy are?

Mr. Zeller: That's right.

Mr. Davis: He is the one who started this complaint. Where am I supposed to find out who they are?

Mr. Zeller: If you will look at the complaint, you will find that counsel signed the complaint.

The Special Master: I will overrule the objection. He can tell what his understanding is, as a chief officer of this company.

A Mr. Davis, my understanding is that the people named in the complaint.

Q Namely, Mr. Hughes, the Hughes Tool Company and Mr. Holliday?

A Among others.

[11852] Q Who are the others?

A Mr. Davis, I suppose there are many people in or connected with the Hughes Tool Company who have had a part in this to a greater or lesser extent. I am sure that Mr. Hughes and the Tool Company and Raymond Holliday didn't act in a vacuum.

Q But you don't know who they are?

Mr. Zeller: We will.

A People who had a part in this—Mr. Cook, Mr. Bautzer, Mr. Davis.

Q You know which conspiracy I am referring to now? The one alleged relating to the pre-emption of the procurement and financing of aircraft.

A Yes.

Q That is the only one I am talking about at the moment.

Mr. Zeller: There aren't several conspiracies alleged in this complaint, Mr. Davis.

Mr. Davis: He testified he understood there was a conspiracy to pre-empt.

Mr. Zeller: This was one of the objects of the illegal conspiracy.

Mr. Davis: I am referring to any conspiracy which involved the pre-emption of the procurement [11853] or financing of aircraft by TWA.

By Mr. Davis:

Q Anyone else you can think of?

A Other than those mentioned in the complaint, specifically not offhand, Mr. Davis.

Q What information do you have as to the existence of a conspiracy with these persons you have identified outside of those named in the complaint?

Mr. Zeller: This is calling for a conclusion of the witness.

The Special Master: Information?

Mr. Zeller: Yes, sir. What he is asking for is what—this is a shorthand way of asking the witness "What in your opinion will support the allegations of the complaint by way of fact?"

He has been through at length—I don't know what the count is, but I think today is the twenty-eighth deposition day—the facts this witness knows with respect to the subject matter of the lawsuit.

Whether the facts that the witness knows will support the allegations of the complaint, that is something that we can argue about. I don't see that it is relevant at all, but we can argue about that. That is a lawyer's matter. This is just argument. [11854] The Special Master: The inquiry as to the facts that support a conspiracy, is that not as to facts?

Mr. Zeller: No, sir, but when he asks it in the form of the ultimate question, it is no longer an inquiry as to facts. It is an argument as to a conclusion.

The Special Master: I will overrule the objection.

A What is the question?

(The question was read.)

A Mr. Davis, all that I have heard about the problems associated with the procurement of aircraft and the finance-

ing of TWA, insistence on the part of Hughes that he maintain his control—this involves quite a mass of information from a variety of people over a period of time. I am not sure I can sort out each piece of it and tell you where it came from.

Q Are you referring to anything other than what you have already testified to?

A I just couldn't quickly recall whether I have testified to it all or not. I think probably no.

Mr. Zeller: It is a question that calls for the witness to keep in his mind 5000 pages of [11855] transcript.

By Mr. Davis:

Q Will you identify the information that you have relating to what you have described as the efforts of Mr. Hughes, or of this conspiracy, to monopolize or otherwise pre-empt the procurement or financing of aircraft by TWA, without repeating anything which you have already testified to?

You may repeat it as much as you care to if you are uncertain as to whether you have already testified to it.

A Mr. Davis, it is my understanding that from prior to the time that Mr. Thomas became president, that Mr. Hughes has insisted on personally approving all purchases of aircraft and all financial arrangements. And when Mr. Thomas became president of TWA, it was distinctly understood that he would have nothing to do with those two subjects.

It is further my understanding that the motivation of Mr. Hughes sprang from the fact that Mr. Hughes is a very rich man, that the Hughes Tool Company made substantial profits, and that if those profits were paid out in

the normal course as dividends, that the vast majority of them would go to Uncle Sam in the form of taxes.

[11856] And as a consequence of that, Mr. Hughes was concerned with means of having Hughes Tool Company in the business of running an airline, and to be so fixed that it would have demands on its cash which would make it impossible to pay dividends, and thus would make it possible to avoid a 102 tax problem that obviously would exist in the absence of this need.

It is further my understanding that towards the end of each year, at least in the earlier days, Hughes conferred with the financial people for the purpose of reviewing this problem and seeing to it that there were commitments that would offer ample protection against any 102 type of claim.

It is further my understanding that for some reason which I have never fully understood, Mr. Hughes insisted on keeping percentage interest in TWA at a point just under 80 per cent, thus enabling him to treat this as an integral part of the Hughes Tool Company business without getting him in the position of consolidating earnings for tax purposes.

From what I have been told in these regards, I have concluded that the interests of TWA were sacrificed to the personal interests of Howard Hughes and both the personal whims and the personal tax problems of Howard [11857] Hughes, and that the welfare of TWA from the standpoint of being free to finance itself and to raise capital, even though it meant a dilution of the Hughes interests and to itself, go out and make its own arrangements for planes, were treated as secondary to Hughes' primary interest in his own welfare.

As I know, I read the article to which frequent reference has been made here, called "The Spook and the Bankers" or "The Bankers and the Spook"—I can't remember which—which recounted many of the problems faced in trying to work out the 1960 financing.

I have been told several times by Mr. Wadsworth of Dillon, Read, and others, by Mr. Sessel, that it was next to impossible to work anything out with Mr. Hughes because things would get about to the point of decision, and then nothing would happen. That he would constantly stall and postpone, and that several attempts to really straighten out TWA's financial condition were thwarted by the fact that Hughes insisted on being the person to decide such things, and that either it was impossible to get decisions from him, or he would refuse to do what seemed to be necessary to the achievement of the ends required.

I have also been told, principally by Mr. Leslie, [11858] I think, that Mr. Hughes refused to let TWA be run like a real business organization, and in particular prevented it from having the continuity of management that would enable it to be run as well and as profitable as its competitors.

That is perhaps a bird's eye view of the matter.

[11859] Q Have you identified now all the areas?

A I am sure I haven't identified every single one of them, but I think with my prior testimony I have identified certainly the important areas which characterize my thinking or knowledge on the subject.

* * *

[11864] Q Among the various matters identified in your last answer, Mr. Tillinghast, you referred to an understanding that you had that Mr. Hughes resisted the procurement of aircraft or financing without his personal approval.

My question to you is: What is your understanding based upon? Who told you that?

A I have been told that by many people, Mr. Davis.

Q Anyone at TWA, or anyone claiming to have personal knowledge of the facts?

A Yes.

Q Who?

[11865] A Mr. Rummel and Mr. Leslie, Mr. Rowe, Mr. Pierson.

Q Mr. Pierson?

A Yes. Those are all that come to mind at the moment, but I am sure that numerous other people have remarked on this. I have always understood this to be something about which there wasn't the slightest question whatever.

Q But those are understanding on oral conversations with those people. You never received anything in writing in the form of a report or memorandum, or you never saw any such writings or memoranda purporting to set forth facts or examples of this?

A I don't recall any writings that dealt with this problem. I have never known any occasion within TWA for anyone to write it.

Q Do you know of those people whom you have identified, do any of them claim to have had direct communication with Mr. Hughes in that regard?

A I know Mr. Leslie and Mr. Rummel have.

Q Does Mr. Rowe claim to have had direct communication with Mr. Hughes on that subject?

A I don't recall his having claimed to have had direct communication with Mr. Hughes on that subject.

Q Mr. Pierson?

A I just don't know so far as Mr. Pierson is con-

[11866] cerned. Mr. Davis, as I recall what Mr. Pierson said on the subject, it was just a casual remark in the course of a conversation with him in the early days.

Q Was anyone else present at the time he made that remark?

A Not that I recall.

Q You also testified as to your understanding relating to the alleged motivation of Mr. Hughes in connection with tax questions, 102 problems, and the like?

A. Yes.

Q What is the basis of your understanding as to the motivation of Mr. Hughes?

A Well, it consists principally of a conversation with Mr. Leslie.

Q Anyone else? Mr. Slack?

A Yes, Mr. Slack.

Q Do you recall the occasion when you discussed that with Mr. Slack?

A Yes, I recall the occasion when I discussed it with Mr. Slack, because the way this came about was that one day I was thinking about this complaint, and this would have made it, I guess, June, maybe May—I can't remember just when—and I was wondering really what had been the point of all this running of airplanes through [11867] Hughes Tool Company. As I was thinking about it, it occurred to me that maybe it was a 102 problem that was responsible for all this, and I walked down the hall and went into Mr. Leslie's office, as I recall it.

I asked Mr. Leslie, or I said to Mr. Leslie, as I recall it, "It just occurred to me what this procurement is all about. It seems to me obvious that Mr. Hughes has a 102 problem, and that this would be a convenient way of solving that problem."

I can't remember just exactly what he said in response to that, but then he went on to say that for years, I believe both when he was with Hughes Tool, and after that, when he was with TWA, in the latter part of the year there would be a conference in which they would discuss this problem.

He said Hughes was one of the best taxmen that ever lived, and he was completely pre-occupied with the subject of taxes, and personally completely absorbed in this tax problem, and it was one that had been a perennial problem year after year.

(Mr. Cook entered the hearing room)

I am not sure whether it was the same day—as a matter of fact, I think I have my chronology a little bit wrong here, because I think my conversation with [11868] Mr. Slack was before my conversation with Mr. Leslie. I was thinking first it was after, but it wasn't; it was before.

I asked Mr. Slack the same question. Mr. Slack gave me a long speech about how he had been Mr. Hughes' attorney, and had professional obligations, and didn't feel free to talk about the subject, and so forth and so on, but from what he said I got the very distinct impression that I had hit the nail on the head.

This was obviously about the time of a board meeting, because Mr. Slack was there in New York.

Q And following this conversation with Mr. Slack, you went to see Mr. Leslie?

A I think it was in that sequence. It may have been the other, but I think I talked with Mr. Slack first, and then talked with Mr. Leslie.

Q Can you tell us a little bit more specifically what it is that Mr. Slack said to you?

A It is hard to be exact, but he said he had been very close to Mr. Hughes. That he had represented him in many ways as his personal counsel. That one of the things that he had dealt with was what I was asking him about.

Q The 102 tax problem?

A That's right. That Mr. Hughes had given him, [11869] many provocations, but that he took great pride in his professional rectitude. He didn't use exactly that word, but his professional obligations. That so far he had not breached his obligations, vis-a-vis, Mr. Hughes, and that he hoped that I would not urge him to or force him into something of that sort.

Whereupon, I said that I wouldn't think of doing it, and the conversation stopped there.

Q While I am on that subject, will you identify the source of your information that at the end of each year, particularly in the earlier days, Mr. Hughes conferred with his financial people for the purpose of reviewing the problem?

A Mr. Leslie.

Q Mr. Leslie told you that?

A Yes.

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[Testimony—July 27, 1962]

[11925]

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Q Is it a fact that the Cahill firm wanted to file this type of complaint rather than a general misfeasance case?

Mr. Sonnett: If counsel's question relates to the meeting in the Waldorf, I have no objection.

If it relates to the meeting at the Yale Club, I have no objection.

And if the question is put properly, as to what counsel said, not what counsel wanted, I have no objection.

But if he is intending the question to reach any other occasions, as to what counsel said, I object.

Mr. Davis: Mr. Rankin, I don't know why we have to take that much time on what is perfectly obvious. Mr. Sessel, a director of TWA, reported something to Mr. Gordon of the Bank of America.

I am merely inquiring of this witness whether or not he knows as a fact what appears to have been a statement by Mr. Sessel to Mr. Gordon is true.

If it is true, and subsequently I tie it up, it seems to me unquestionable that Mr. Gordon should be making notes of a true fact from Mr. Sessel, then it [11926] is quite pertinent, it seems to me, the ex-

tent to which the privilege has gone, and my question, I think, is a perfectly proper one.

I have been asking several of them with no objection. Merely because this one perhaps is close to home and is embarrassing to counsel—

Mr. Sonnett: Let me state it now. You have asked for it. I did not recommend a suit charging Hughes with being a thief because I thought it wasn't in the interest of TWA.

Just keep pushing me, and we will see what happens.

Mr. Davis: You will see it all right.

Mr. Sonnett: Suppose you just stop the speeches and get on with your deposition. You are wasting your own time under the Court's order.

I have an objection to the form of your question. I don't think you can ask this witness to characterize statements made in a writing apparently by somebody else at the end of a telephone conversation apparently with Mr. Sessel.

Mr. Davis: This witness is quite capable of answering the question.

Mr. Sonnett: You put proper questions, and he will answer them, as he has been doing for many, many [11927] days now.

The Special Master: He may answer the question as to his understanding of the position of the Cahill firm.

A As I think I testified the other day, Mr. Davis, the Cahill firm recommended an antitrust action as opposed to just an equitable action for a number of reasons.

One was they felt what Mr. Sonnett has just said, that it would not be in the interests of TWA or in the interests of working out some solution of this problem to charge

Mr. Hughes with personal misconduct, the feeling being that this would increase feelings to the point that any sensible solution might become impossible.

They also recommended, as I testified the other day, that the only ultimate solution to this problem was a divestiture by Mr. Hughes or the Tool Company of its interest in TWA so that TWA would not be the tail to somebody else's kite.

They also stated that while they were familiar with such things as his commandeering the 1649 airplane at a time when it was very badly needed by TWA, their investigation of this aspect of the matter was quite incomplete. They felt that it would take a good deal of time. They felt that if this were to be developed it would be desirable to have [11928] an opportunity to question Mr. Hughes and people at the Hughes Tool Company, which had not yet been a possibility. They felt that the damages that could be recovered in an antitrust proceeding would certainly be sufficient to cover miscellaneous damages suffered by the corporation by reason of individual acts of malfeasance, and recommended that rather than to hold this up until they had fully investigated that end of it and were prepared to make a definitive recommendation that we should proceed with the antitrust action.

Q And this was a subject which was discussed at this June 21 meeting, where Mr. Sessel was present?

A This was discussed in part at that meeting, yes.

Q Where was the balance discussed?

A Well, it was discussed, as I testified the other day, at the meeting at the Yale Club.

Q Which meeting at the Yale Club? This is the first time I have heard—

A Well, the meeting with Mr. Reed.

Q June 7th?

A No. I don't remember the date of it.

Q Who was at the Yale Club meeting?

A I have already identified that, Mr. Davis.

Q Where?

A In my prior testimony.

[11929] Q I can't recognize it from referring to it as a Yale Club meeting.

A You will recall, if I may refresh your recollection, that at the end of the session the Special Master referred to it as having been read—held in Mr. Reed's office, and I corrected him in that regard, and you asked if I remembered where it was held, and I said the Yale Club. Do you recall that now?

Q Yes, I recall that. That is what you refer to as the Yale Club meeting?

A That's correct.

Q And where else?

A At the meeting at the Waldorf with Mr. Breech and Mr. Hood and Mr. Leithead, about which I have testified previously.

Q Which you started to testify about. That is the one which you now place at around June 12th?

A Yes. I think that meeting was the meeting here shown as being on June 12th.

Q But Mr. Sessel was not present at that one, was he, or was he?

A No, as I recall it, Mr. Sessel was not there.

Q Was Mr. Sessel present at the Yale Club meeting?

A No, Mr. Sessel was not present at the Yale Club [11930] meeting.

Q So the only meeting you know of at which Mr. Sessel attended where the recommendations or report of the Cahill firm was made was at this June 21 meeting; is that right?

A That is my recollection.

Q And you had no conversations with Mr. Sessel describing those reports or investigations or recommendations of the Cahill firm?

A I would not say that, Mr. Davis.

Q You may have had some?

A I may have had some separate ones. I am just not sure.

Q When did TWA begin to consider with counsel—let me put it this way: When was the first recommendation received from counsel with respect to the institution of an action?

A When was the first recommendation?

Q Yes, received by TWA.

A Oh, I can't tell you that exactly. It may have been in the June 7th meeting to which I testified, Mr. Davis, or it might have been before that. I am inclined to think it is the June 7th meeting, but I wouldn't be absolutely positive about it.

Mr. Davis, if I may come back, I have a feeling, and the minutes would show, that Mr. Sessel may have attended [11931] the executive committee meeting on the 29th of June.

Q I think he was there by invitation, if that helps your recollection any.

A I am sure if you say that he was there by invitation, Mr. Davis, that is the fact.

Q Do you recall between June 1 and July 1 any meetings or conferences which you attended or heard of at which Mr. Sessel heard or discussed these recommendations of the Cahill firm other than what you have now identified as the June 21 meeting and the June 29 meeting of the executive committee?

A I don't recall any, Mr. Davis, but I would have to say that it is entirely possible that during that period I talked with Mr. Sessel at a chance meeting or talked with him on the telephone about this. But I have no specific recollection of it.

Q Do you know to what extent Mr. Sessel may have met with Mr. Reed to discuss the subject matter of this complaint and the underlying facts?

A Well, I have no knowledge of his having met with Mr. Reed for this purpose at all.

Q Did you ever hear that he did, were you ever told that he did?

A Not that I can recall.

[11932] Q Were you ever told or do you know whether or not Mr. Sessel ever met with Mr. Rowe for the purpose of discussing the underlying facts or legal theories of the complaint?

Mr. Sonnett: I object to that. Mr. Rowe is general counsel for Trans World Airlines. Mr. Sessel is a director.

If they had such discussions, I think it is clearly privileged.

The Special Master: Do you think the mere fact that he did meet with him is privileged?

Mr. Sonnett: I think so, yes, because if he met for this purpose inevitably Mr. Davis is interested in ascertaining what was said.

Mr. Davis: May I address myself to that?

Mr. Sonnett: I think the question of whether they met or not, for this purpose, is immaterial.

Mr. Davis: What we are referring to is whether or not the client, not the attorney, has a privilege with respect to a subject matter.

Mr. Rowe and Mr. Reed and Mr. Sonnett and Mr. Cahill had a conference with respect to a subject matter.

Mr. Sessel participated in a conference with Mr. Sonnett and others on that subject matter.

[11933] He, Mr. Sessel, has unquestionably disclosed that subject matter to a third party.

The Special Master: I don't think that is the record.

Mr. Davis: I don't think that there is much of a question, unless you want to question as to how Mr. Gordon, or whoever was at the other end of the Sessel conversation, got the information, which is obviously accurate.

But eliminating that—

The Special Master: I think that is very possible, Mr. Davis, but I don't think it is proved yet. Do you claim it is?

Mr. Davis: Whether it is proved or not, we know that Mr. Sessel, that is, Mr. Keehn, received a telephone call from Mr. Sessel.

You say proved. At this point we will never finish anything, because I would be perfectly willing to call Mr. Sessel tomorrow and establish this, and if I need that as a foundation to pursue it, I will proceed that way.

There is no problem about establishing what the truth is.

But the fact nevertheless remains, Mr. Rankin, [11934] that the subject matter has been waived, was waived in the meetings with Mr. Reed, and the identify of counsel with whom the same subject matter was discussed, Mr. Rowe was at that meeting with Mr. Reed, and it seems to me, quite apart from our right to identify, which is all I am doing at the moment, the discussion of the same subject matter with Mr. Rowe, so far as I am concerned, when I get Mr. Rowe on the stand, and Mr. Sessel on the stand, I will develop what took place.

The Special Master: You may answer the question as to whether or not you know of such a conversation. I think that is the question.

A No, I do not.

Q Mr. Tillinghast, I don't know whether or not we have identified the date of that so-called Yale Club meeting.

Can you now, in the light of what we have established since you last identified that meeting, can you now give us a date or an approximate date as to when it took place?

A Merely that I recall it as having been some time between the board meeting of June 21 and the executive committee meeting of June 29.

Q By referring to both your own calendar and Defendants' Exhibit 4, the calendar maintained by your secretary, you cannot state approximately when it took place between [11935] those two dates?

A No, this doesn't give me any help at all.

Q You see that on Friday, June 23, 11:00 o'clock, there was a meeting with Mr. Cocke, Mr. Leslie, Mr. Rummel, Mr. Taylor and yourself. What was that meeting about?

A Oh, I couldn't recall right offhand what it was about.

Q It had nothing to do with this lawsuit or any of its underlying facts?

A I am quite sure that it had nothing to do with the lawsuit, Mr. Davis, because I wouldn't have had a lawsuit discussion with that group.

Q When and how did you inform the officers of TWA, that is, those who had not attended the executive committee meeting, of the filing of this complaint?

A My recollection is that not long after this—yes, as a matter of fact—no, wait a minute.

Well, Mr. Davis, I am confused. I would have said that I told them of this at a management policy committee meeting, the first management policy committee meeting after the filing of the complaint, but I can't, from either of these, seem to identify such a meeting.

Wait a minute. Here we are. On the 11th, the 11th of July, we had a management policy committee meeting,

[11936] according to my calendar, yes, and I believe it was at that meeting I told them briefly that a complaint had been filed, and very briefly described the nature of the complaint.

. . . .

[11956]

. . . .

Q Going back to your testimony at page 6285 [11846], Mr. Tillinghast, having identified the dispute, I would like you to identify the pressures that the Tool Company had brought to interfere with that. Again, are you referring to the matters, incidents, conversations, documents, testimony that you previously have given?

A That's correct.

Q That is the problem, as you understood it, which you referred to in the next paragraph, which begins on [11957] line 8, is it not, this problem where Mr. Sonnett said, if you recall correctly, "That when the voting trust was set up, people felt that at last they had this problem solved and had stability, and it was just a matter of time before another controversy arose"?

Mr. Sonnett: I think it is repetitious, but maybe it will be quicker.

Q Do you recall then Mr. Sonnett saying "I think you have to face the fact that it is very unlikely that you will ever be free of controversy, so long as this relationship exists"?

What relationship were you referring to?

A The relationship of ownership of the great majority of TWA stock by the Tool Company.

Q And for that reason he thought, that is, Mr. Sonnett thought, the divestment proceeding was what was really needed to solve the problem?

A I so testified.

Q Do you recall what Mr. Cahill said, if anything?

A Oh, I am not sure that I can altogether distinguish what Mr. Cahill said and Mr. Sonnett said, except that I think I do recall one statement which Mr. Sonnett made, which was to the effect that "let's face it, in this day and age it is just not in the public interest for someone [11958] to try to make a plaything out of an institution that is of the public importance of TWA."

Q And in that connection did he indicate that was the purpose of the antitrust laws?

A Well, now, I am not sure I understand that question.

Q My prior question was did you recall what Mr. Cahill said, and apparently that reminded you of something else that Mr. Sonnett said?

A I said I don't specifically recall what Mr. Cahill said, I have difficulty distinguishing between—with certainty—between what he said and what Mr. Sonnett said, except that it is my recollection that Mr. Sonnett did most of the talking and Mr. Cahill did less of it.

Q Do you recall what Mr. Rowe said?

A Yes. I remember Mr. Rowe raising the question of the effect on this of Civil Aeronautics Board proceedings, and saying that he felt that there was a very substantial problem as to whether those had had the effect of giving antitrust immunity to the transactions involved.

Q What was the response made by Mr. Sonnett and Mr. Cahill to that comment by Mr. Rowe?

A Beyond what I have already testified to, or do you want me to repeat?

Q No, no, don't repeat. You may always assume I am [11959] not asking you to repeat.

A Well, I think I have already covered that in my testimony about their comments on the Panagra case and the duPont case.

Q Do you recall their saying that in order to get around that it would be necessary to allege a conspiracy?

A No, I do not.

Q You mean your only recollection now is that these two cases that you previously referred to was an answer to the exemption of the provisions of the Federal Aviation Act?

A I have already testified in large measure on this, Mr. Davis. What they said, referring to the Panagra case, was that they didn't believe that the approval by the Civil Aeronautics Board of a specific act carried with it any approval of an underlying conspiracy or scheme violative of the antitrust laws of which that might be a part.

Q Was there a description of how the antitrust laws were violated at that meeting, what facts were described as the basis for the violation of the antitrust laws?

A To some extent, yes. As I recall it, they said that they thought certain things were clear from their investigation—again, I think I have covered a good part [11960] of this—first, that Hughes had insisted upon controlling—

Q Are you repeating now?

A Yes.

Q I don't want you to repeat.

A Well, Mr. Davis, I regret to say that many if not most of your questions call for repetition.

Q I am sorry you don't like them.

A I would be happy to go over all this again if you want me to.

Q No, you don't have to go over anything again, Mr. Tillinghast. What I want to know is in this discussion, when Mr. Rowe pointed out the exemption of the antitrust laws, and the response made by Mr. Cahill and Mr. Sonnett, and this reference that if there had been violation of the antitrust laws or if there was a violation of the antitrust laws approval of specific acts would not be an exemption—I am asking you whether or not there was a discussion as to specific acts, either relating to an alleged conspiracy or the possibility of the existence of a conspiracy, or specific

acts as examples of this alleged description that you have given.

A No, I don't recall a discussion of particular acts. I recall rather a description of a general course of conduct of controlling the purchase of airplanes and [11961] controlling the financing, and insisting on the maintenance of control.

Q In other words, they just referred to a conclusion as to a general course of conduct?

A Yes. I would say their factual statements were more conclusory, Mr. Davis, than they were particular.

Q What factual conclusions do you recall having made at that meeting?

A Beyond those to which I have already testified?

Q Yes.

A I don't recall any offhand, beyond those to which I have already testified.

Q But you have testified as to a general conclusion that Mr. Hughes tried to pre-empt the acquisition and financing of aircraft. Were any facts referred to relative to that statement?

A At this point, Mr. Davis, I recall only the broad conclusion that Mr. Hughes had insisted on controlling the acquisition of aircraft, and controlling financing, and maintaining his stock position in TWA. You will recall I have already testified as to what they said about Mr. Thomas saying that he had a specific understanding with Mr. Hughes that he was to have nothing to do with the acquisition of aircraft or financing.

* * *

[11964] Q Do you recall whether or not Mr. Rowe expressed disagreement with the conclusions or recommendations being advanced by Mr. Cahill and Mr. Sonnett?

A Beyond the extent to which I have already testified?

Q I don't believe you have ever testified as to a disagreement. You have testified that Mr. Rowe referred to CAB orders.

A All I can say is, Mr. Davis, that I recall no dis-[11965] agreement beyond that to which I have already testified.

Q Is it your present testimony that your prior testimony described a difference of opinion betwen Mr. Rowe and the Cahill firm?

A To this extent, that as I say, Mr. Rowe raised the question and expressed concern as to what the effect the CAB orders might be. I don't know whether you characterize that as a disagreement or not, but he raised that question, and that question was discussed.

Q You say he expressed concern. Will you tell me what your recollection is, what your total recollection is as to what Mr. Rowe said, or the substance of what he said, which you are describing as an expression of concern?

A Mr. Davis, I think I have already testified to that.

Q I don't believe you have.

A At the risk of repetition here, as I recall it, Mr. Rowe said that he thought there was a serious question as to the effect of CAB approval on the transactions which were involved in the complaint. He said he was quite sure that the Tool Company would argue that by approving the specific transactions relating to the purchase of planes and the leasing of planes, and whatnot, that the Civil Aeronautics Board had thereby removed the matter from the purview of the antitrust laws.

[11966] As I have testified, I think two or three times, Mr. Sonnett or Mr. Cahill, or both, alluded to the Panagra case and to the conclusion to which the Court had come in that situation, and said that in their view, approval of specific transactions by the Civil Aeronautics Board just could not, in the nature of things, have the effect of ap-

proving an underlying plan or conspiracy of which these were just a part.

I believe, as I recall it, they said they very much doubted that the Civil Aeronautics Board was aware of the fact there was a common plan that tied these things together, and they felt quite confident that what the CAB had done would have no effect on the legitimacy or lack thereof of the underlying conspiracy.

Q This was the first time that the Cahill firm, after whatever investigation was conducted by them, where they reported tentative conclusions or recommendations to TWA or its management?

A I believe that's correct.

Q Will you give us your best and complete recollection as to how this so-called underlying plan or conspiracy was described by either Mr. Cahill or Mr. Sonnett?

A Again, Mr. Davis. I have already covered that.

Q You cannot describe it any better than you have in [11967] your prior testimony; is that correct?

A That's correct.

Q You also said that they reported that the CAB in granting the particular approvals may not have been aware of the facts as to the common plan which tied things together, or words to that effect?

A Yes.

Q Will you give us your total recollection as to how this common plan was described?

A Again, Mr. Davis, I have testified to that as far as I can, I believe.

Q You cannot describe that so-called common plan any better than you already have?

A I think not.

Q Was there anything said which described how things were tied together?

A Not beyond that to which I have already testified.

Q And you are unable at this time to describe more particularly than you already have, if you have at all, how things were tied together?

A That's correct.

Q Did Mr. Rowe in connection with his reference to CAB orders indicate that he was personally familiar with these various applications which had been filed with the [11968] CAB?

A I got the impression that he was quite familiar with them.

Q Did he describe the nature or extent of the facts disclosed to the CAB in connection with those applications?

A Not that I recall.

Q Do you recall whether or not he said something to the effect that every transaction between the Tool Company and TWA had been submitted to the CAB with a full description of the transaction, or words to that effect?

A No, I don't recall that.

Q Do you recall anything along those lines?

A I recall, I believe, his having said that each of the major transactions had been submitted to the Civil Aeronautics Board.

Q Each of the major transactions?

A Yes.

Q Did you understand what he meant by major transactions?

A I believe, Mr. Davis, that every transaction involving in excess of a dollar amount—I think it was $50,000, although I am not sure of that, had to be submitted to the Civil Aeronautics Board, and I took it that is what he was referring to, and not minor transactions.

Q The CAB order itself indicates what that is. I [11969] believe it was $200 in any one transaction, or $10,000 in any one year.

A Is that what it was? I thought that is what it was, but maybe I am wrong.

Q In the Northeast control case they made it $100,000. My interest at this point is what your understanding was of what Mr. Rowe said at that particular meeting as to the nature or scope of the approvals of the CAB.

A I don't think I can add to what I have already said, Mr. Davis.

Q What was Mr. Reed's participation in this conference?

A As I recall it, Mr. Reed's was a rather passive participation. My recollection is that when Mr. Rowe raised this question, Mr. Reed displayed interest in it and wanted to know what the answer to that was.

But as I say—

Q Answer to what?

A This problem raised by Mr. Rowe. But I don't recall Mr. Reed as having had a great deal to say at that conference.

Q Was there any conversation or discussion that you can recall which identified the participants to this alleged conspiracy?

A At that point, Mr. Davis, I don't recall any substan-
[11970] tial discussion of that.

Q And you cannot recall anything more that Mr. Reed said at that conference?

A Not at the moment, no, I can't.

Q Did he say anything when someone, either Mr. Sonnett or Mr. Cahill, referred to the purpose of the voting trust?

A I don't remember that Mr. Sonnett or Mr. Cahill referred to the purpose of the voting trust.

Q In your testimony before the luncheon recess, as I recall you did say something to the effect that at one time some people felt that this problem had been solved by means of the voting trust.

A Yes, that's correct.

Tillinghast Deposition.

Q When that remark, which I believe you attribute to Mr. Sonnett, was made, do you recall whether Mr. Reed said anything about what the purpose or function of the voting trust was?

A No, I don't recall his having said anything about what the purpose or function of the voting trust was.

Q Did he say anything about the attitude or interest of the lending institutions?

A In what?

Q In the subject under discussion.

A No, I don't recall that he said anything at all [11971] about that.

* * *

[11976] Q At this conference with Mr. Cahill and Mr. John Sonnett, on June 7th, was there any discussion or reference to the communications which TWA had received from the Tool Company or its representatives?

Mr. Sonnett: Perhaps by inadvertence, and I want to be sure if it is done, it isn't done by inadvertence—before Mr. Davis presses the question in that form, I ask him to consider and decide if he wants to press it, whether he includes communications by Mr. Greg Bautzer, who was authorized to act for the Hughes Tool Company at that time, and who was engaged in certain conversations at that time with Mr. Reed, among others.

[11977] By Mr. Davis:

Q At this time I am placing no limitation, Mr. Tillinghast, to anything which was discussed or referred to at this conference on June 7th.

Mr. Sonnett: Let us have the question.
(The question was read.)

Q Do you understand my question, Mr. Tillinghast?

A Yes, I do, Mr. Davis. I have just asked for Exhibit 11-F here in order to refresh my recollection of what communication, if any, came in just prior to this meeting. That may help me to answer your question.

Q Let me identify at least two that I know of. There was a letter of May 19th addressed to the Securities and Exchange Commission, of which a copy, I believe, was sent to TWA.

Then there was a communication dated May 26th, and that one was, I think, a supplement to the prior letter.

The next communication that I am aware of, that has been marked for identification, is a letter dated June 10th, which would be after this meeting.

What Mr. Sonnett is referring to about communications with Mr. Bautzer, I have no idea.

> Mr. Sonnett: If you look at Defendants' Exhibit 107, you will find at the end of it as follows:
> [11978] "Says Bautzer in New York and is talking to the lawyers there."
>
> As you very well know, you know exactly what Mr. Bautzer was doing at the time, and you knew then.
>
> Mr. Davis: We will get all of the facts, Mr. Sonnett. When I say all of the facts, I mean all.
>
> You are looking at something dated July 7, 1961.
>
> Mr. Sonnett: That's right. If you are limiting yourself to June 7th and before, that is okay.
>
> Mr. Davis: I am limiting myself to what was discussed. Perhaps you had clairvoyance.
>
> Mr. Sonnett: Pretty good information as well.

A Mr. Davis, there was discussion at that time, I believe, of at least one particular communication, and that was the telegram that you had sent to Boeing Company in

an attempt to dissuade them from proceeding with the Boeing contract, and indeed there was general reference, as I recall it, to the whole line of communications leading up to that, and the view was expressed that certainly none of these was covered by any orders of the Civil Aeronautics Board, and quite apart from anything else in the action, these appeared to constitute a malicious interference with the business of TWA.

There was also, as I recall it, a comment on the communications that you delivered orally at the meeting on the [11979] 2nd of June, at which time you gave your technical presentation. I believe the remark was made, if you will forgive me, that it was a rather unenlightening presentation, and exhibited more a desire to divert our attention than to add to our knowledge about the technicalities of aircraft.

That is all I recall at the moment, Mr. Davis, about reference to communications from the Tool Company.

Q In your answer you said, "The view was expressed." You did not identify who expressed those views. It would expedite matters if in your answer you tried to identify, as well as you can, who expressed particular views. Do you recall who expressed the views that those communications could be considered malicious or willful interference into the affairs of TWA.

A I think Mr. Sonnett.

Q Do you recall what comment that evoked from anyone else there present?

A None other than general acquiescence.

Q Was the fact mentioned by either Mr. Cahill or Mr. Sonnett that I had been trying to confer with Mr. Cahill?

A Not that I recall, Mr. Davis.

Q Are you quite sure there was no reference made to the effort made on behalf of the Tool Company, of the Cahill firm, whenever they were through with their investigation

to let [11980] us have a copy or report of whatever facts they had?

A Yes, Mr. Davis, there was a comment on that, but I didn't understand that to be the thrust of your question.

As I recall it, two things were said on that subject. One, I think, substantially what you said now about Mr. Sonnett or Mr. Cahill, that you had requested an opportunity to discuss with them the results of their investigation before they made any recommendations.

The other was that Mr. Reed said that Mr. Bautzer had pressed him several times to talk with him after the investigation was completed and before any action was taken, and Mr. Reed said that he had told Mr. Bautzer that he would do whatever he could in this regard.

I can't remember whether it was at this meeting or a subsequent meeting, where I believe Mr. Cahill or Mr. Sonnett said that they had taken the position with you that they would be very happy to sit down and discuss the matter with Mr. Hughes, but that you had shown no disposition to make Mr. Hughes available to discuss any of these problems.

Q Do you recall a statement by Mr. Cahill or Mr. Sonnett to the effect that the Tool Company was prepared to give them whatever facts or information they might want to inquire into in connection with their investigation of what had taken place?

[11981] A No, I don't recall that, Mr. Davis.

Q Did they report a statement attributed to me to the effect that Mr. Hughes was not available, but that all officers or employees of the Tool Company having participated in any of these transactions were available.

A I rather remember, Mr. Davis, and I am not sure it was at this meeting, Mr. Sonnett or Mr. Cahill said that you had taken the position that Mr. Hughes would not be

available, but that you would be glad to submit to him any questions that they wanted to ask.

Q Was there a discussion at that meeting as to the probable availability of Mr. Hughes, either as a witness or as a person who might be interviewed?

A I believe it was at this meeting that Mr. Sonnett and Mr. Cahill expressed their desire to talk with Mr. Hughes, but I don't remember anything beyond that at this time.

Q Do you know if Mr. Rowe or Mr. Reed or anyone else indicated that Mr. Hughes might not be readily available?

A I don't recall, Mr. Davis, anyone saying that expressly, although I am quite confident that everyone present was aware of the fact that it might be difficult to assure Mr. Hughes' presence.

Q Let me rephrase my question in all candor. Wasn't there a discussion as to the well known reluctance of Mr. [11982] Hughes being available as a witness?

A I don't recall it at this time, Mr. Davis.

Q You mean it was at some subsequent time?

A I remember a subsequent discussion of that problem.

Q Don't you recall comments made to the effect that if this action is brought, it will never go to trial because Mr. Hughes will never want to subject himself as a witness?

A No, I do not.

Q You are quite sure that wasn't discussed at all?

A Let me say this: The subject which you are asking about was not, as I recall it, discussed at all at this meeting.

Q It was discussed at a subsequent meeting?

A Well, there was discussion of that subject, or that broad subject, sometime before the action was brought.

Q Can you identify the meeting at which it was discussed?

A The only time that I can distinctly remember its having been discussed was after the action was brought, Mr. Davis.

Q I am referring to before the action was brought, Mr. Tillinghast.

A No, I don't recall that, Mr. Davis.

Q Are you prepared to say as part of your testimony [11983] that it was not discussed?

A I am prepared to say, Mr. Davis, that I have no recollection of that subject having been discussed before the action was brought.

Q At this meeting on June 7th, what was said with respect to the preparation of a final report on the factual investigation that had been undertaken?

A I don't recall anything, Mr. Davis, at this meeting. As I recall the way this meeting broke up, it was on the note that the Cahill people were going to consider the matter further, and think about some of the questions that had been raised, and perhaps embody in a draft of complaint some of the conclusions to which they had come.

Q You mean the result of the factual investigation undertaken by the Cahill firm was to be presented to TWA in the form of a draft of a complaint?

A In a sense that is true, yes.

Q How long had the Cahill firm been retained to investigate the factual situation?

A A matter of two months or so.

Q And it is your testimony, is it, that prior to June 7th, no written report had been received by TWA on this investigation by letter or memorandum or otherwise?

[11984] A So far as I know, there was no such report.

Q Were the financial arrangements to be compensated on the time spent on the investigation?

Mr. Sonnett: I don't know the propriety of this.

The Special Master: What is the relevance?

Mr. Davis: I am not asking for the amounts. I am asking whether there was a time basis, a fixed fee basis, was it dependent on the work done, was it dependent on the result of the action, was it dependent upon bringing about settlement or a divestiture of the stock? I am trying to determine at this time what interest, if any, the Cahill firm had in the subject matter of this lawsuit. If it was just a simple normal arrangement that is common with respect to getting billed for time of attorneys employed, it is easy enough to say so without embarrassment to anyone.

Mr. Sonnett: I don't find any embarrassment in the subject matter whatsoever, Mr. Davis. It is just that I think you are going down a false trail, and I don't like to give you any comfort in doing that. I have no objection to the witness stating in general the terms on which my firm was retained. [11985] But I have very strong objection to Mr. Davis seeking to convert that into an effort to pry into what we did.

The Special Master: You may answer the question along the line indicated by counsel.

A Mr. Davis, so far as I know, there is no special arrangement as to the compensation of the Cahill firm. The understanding so far as I know is merely that they will be paid for professional services like any other lawyer.

Q At the time of that June 7th meeting, had TWA received a statement for services rendered?

A I would have to check to be absolutely sure, Mr. Davis, but I think not.

Q Was there a discussion at this meeting of June 7th as to the amount of work or effort that might be entailed to prepare a factual report in the form of a draft complaint?

A No, there wasn't, Mr. Davis.

Q Was there any discussion of the probable costs and expenses that might be involved in bringing an antitrust action for the purpose of achieving whatever the objectives were of TWA?

A Not that I recall.

[11986] Q That subject wasn't raised at all?

A That is my recollection.

Q At that meeting of June 7th, in connection with the presentation, if I may call it that, which was made by the Cahill firm, wasn't there some reference to the people who had furnished them with information? Wasn't there a description of the type or nature or scope of the investigative work that had been conducted?

A I remember, Mr. Davis, that at that time they stated the names of certain persons with whom they had talked. I rather doubt that I can give you a complete list of those people at the present time, but I know they did tell us various people with whom they had talked.

As well as I recall it, they told us of some more with whom they expected to talk.

Q Will you first identify, to the extent to which you can recall it, but being as complete as you possibly can, the identity of the persons with whom they had talked in connection with the development of the facts which formed the basis of their recommendation.

Mr. Sonnett: I object to that on the ground it calls for work product. I know of no rule that that makes available anything that was said to the witness. I rely in this connection entirely on the [11987] work product privilege.

The Special Master: Are you making that objection to what was said at this meeting about who you talked to?

Mr. Sonnett: Yes. Because I think that a disclosure at that meeting of people we had talked to, or

people we intended to talk to is part of the work product.

I know of no rule that a disclosure under such circumstances to people who were directors of TWA, or acting in the common interest of TWA, or Hughes Tool Company and the voting trustees, as was the the case, results in waiving of the protection of the work product of counsel.

The Special Master: I will overrule the objection. You may answer it.

A As far as I can remember now, Mr. Davis, they said they had talked with, I believe, Mr. Leslie and Mr. Cocke, and I believe Mr. Pierson, although I am not absolutely sure of that. With Mr. Rummel, Mr. Fellows, Mr. Thomas, Mr. Spater, Mr. Rowe. Those are the only ones that I can recall. I think I should add Dillon, Read.

Q Without identifying who at Dillon, Read?—

A They very likely did, but I can't recall at the [11988] moment.

Q At that time did they disclose or indicate that they had been general counsel for Dillon, Read?

Mr. Sonnett: I object to the form of that question. It asserts as a fact something which is false. My firm has never been general counsel for Dillon, Read.

Mr. Davis: I will accept the statement of counsel if it is intended as a statement for the record.

Mr. Sonnett: It is intended as a statement of fact for the record. My firm has done a good deal of work for Dillon, Read in the financial field. It has never been Dillon, Read's general counsel.

By Mr. Davis:

Q Was it disclosed at that meeting that the Cahill firm had done a great deal or a substantial amount of work on various matters for Dillon, Read prior to that time?

A No, it was not, Mr. Davis. I am quite sure because I recall having learned that as a result of some paper you filed in this action some time after the action was started.

Q That was the first time you learned that?

[11989] A That's correct.

Q Do you recall whether any statement was made tending to indicate that this investigation which had been commenced two months before had been in the broad investigation of all aspects of aircraft acquisition and financing?

Mr. Sonnett: I don't think I understand that question.

The Special Master: Will you read the question?

(The question was read.)

A I think the answer is no.

Q Did you understand when this first report was made on June 7th that the Cahill firm had investigated the possibility of other defendants than the Hughes Tool Company in connection with the delay which had occurred in having aircraft become available to TWA in 1960 and 1961?

A I am under the impression, Mr. Davis—it is my vague recollection that they had given some thought to the part of Convair in any delay.

Q What is the basis of that answer and its limitation?

A I recall, I think it was this meeting some question [11990] being raised in passing as to whether Convair had been culpable to any extent, and whether or not they should be named as a co-conspirator.

Q Was there any description or identification of the facts which warranted a consideration of that possibility?

A Well, the only thing that I can recall is that it was suggested that question existed as to whether or not they had acquiesced in some of the delays to the point that they could be said to be a party to any concerted effort to keep the planes from being available to TWA.

Q Was there any statement made indicating that the inquiries made of these people that you have identified would be reduced to writing?

A I don't recall any discussion of that one way or the other, Mr. Davis.

Q Was there some identification or description of the kind of information that had been obtained from these various people by groups?

Mr. Sonnett: I think at this point we are faced with an attempt to breach the work product privilege. He is now attempting to get into the question of what particular witnesses or possible witnesses may have told counsel.

[11991] I don't think a disclosure that counsel have talked to witnesses results in a destruction of the work product privilege with respect to what the witnesses had to say to counsel.

The Special Master: You may answer as to the characters of the disclosure by the witnesses, if it was made at this meeting.

A I don't recall any such disclosure, Mr. Davis.

Q How did these people happen to be mentioned?

A As I recall it, in the early part of the discussion they said they had talked with so and so and such and such. That is the context in which it came up.

Q Without identifying what they talked about?

A Well, I wouldn't say that is entirely correct. As I recall it, broadly the identification of the subject matter of the procurement of aircraft and financing, relations

with Hughes Tool Company, but I don't recall any specific recitation of what they talked to people about, and what people said, except as I have already testified to.

Q But that is not the purpose of my question, Mr. Tillinghast. I merely want you to give me your full and complete and total recollection as to what was said. However it was said, with respect to these various people [11992] whom you have identified, and what information was disclosed, or the nature of the information disclosed.

A I have covered that as fully and completely as I can, Mr. Davis.

Q I will look at your testimony before the next session, because either I don't understand you at all, or you recall your prior testimony differently than I do.

Mr. Sonnett: You do that, Mr. Davis, and suppose you get on with the deposition now.

Mr. Davis: You have previously testified that at this meeting reference was made to the separate estimates which had been obtained from Mr. Leslie and Fellows relating to damages. Will you give us your complete and total recollection as to what was said in connection with those estimates?

A I believe that I have already given it to you, Mr. Davis.

Q I don't believe so. Will you please give it to me now?

A Well, the only thing that I recall is that I believe Mr. Sonnett said they had talked with Mr. Fellows about the amount of damages suffered by TWA, and that he had come up with an estimate of about $35 million. I was about to go to Mr. Leslie, and I think in order to give completely [11993] the statement that I recall was made, I will have to deal with them together.

Q Deal with them together?

A And that Mr. Leslie had independently made an estimate, and that he had come up with the same figure.

Q Did anyone attempt to describe the method followed, or how Mr. Fellows arrived at $35 million?

A I don't recall it, Mr. Davis.

Q Did anybody ask any questions, is that the right figure, is it the proper figure, was it based upon daydreaming—no description whatever—is that your testimony?

A As I recall it, this was just touched on in passing.

Q What was said with respect to what you have described as Mr. Leslie having reached independently the same figure of $35 million?

A I have just testified to it, Mr. Davis.

Q That is all that was said?

A That is all I recall.

Q No description of how Mr. Leslie arrived at that figure?

A That's correct.

Q And you asked no questions?

A I don't recall having asked any questions about it.

Q And this was the first time that you heard the [11994] figure of $35 million?

A That is my recollection.

Q And counsel did not indicate what the basis was for arriving at $35 million?

A Not beyond what I have just testified.

Q Do you think that you have a complete recollection of what transpired at that meeting in that regard?

Mr. Sonnett: I object to this. It is wasteful of time, it is argumentative, and it gets no place. Every time Mr. Davis engages in one of these exercises, we lose another five minutes.

The Special Master: You may answer as to whether or not this is your best recollection.

A This is my best recollection.

The Special Master: We will have a short recess. (Whereupon, a short recess was taken.)

[11995] By Mr. Davis:

Q Mr. Tillinghast, it is true, is it not, that the decision to commence this action was made in connection with the authorization granted at a meeting of the executive committee of the board on June 29th?

A Yes, it is.

Q At or about that time, did you discuss with Mr. Breech the action to be taken at that executive committee meeting? Mr. Breech was a member of that committee was he not?

A Yes, he was.

Q But he did not attend?

A That's correct.

Q My question to you is whether or not you discussed with Mr. Breech at or about that time—do you want to refer to what your secretary prepared from the telephone calls made from that number in your office?

A Mr. Davis, I cannot recall whether I did or did not talk with Mr. Breech.

Q About the action to be taken at that executive committee meeting? You cannot tell us?

A I can only say this, Mr. Davis. I have no independent recollection of it. It was my custom when there was an executive committee meeting, usually to call Mr. [11996] Breech to tell him the matters that we were going to take up at the executive committee meeting, because, with perhaps one or two exceptions, Mr. Breech has never attended executive committee meetings, and has had an understanding that when we held one on short notice, we would advise him of the matters that were going to come

up so that he could determine whether or not he wished to be in attendance.

I think it is very probable that I followed that routine on this occasion, but I would have to say I have no independent recollection of it.

Q Defendants' Exhibit 108 indicates that you made a telephone call to Mr. Breech on June 28th?

A It indicates that somebody did.

Q You don't think it was you?

A I just say I don't know whether I was the one or not, Mr. Davis. I think probably so, although I don't have any independent recollection of it.

Q Then you will note that this indicates, Defendants' Exhibit 108, that a telephone conversation with Mr. Breech from the telephone in your office, on July 31st—again immediately before and shortly after the executive committee meeting of June 29th?

A This is over a month later, Mr. Davis. I am afraid [11997] you are confused.

Q Just on June 28th, the day before the executive committee meeting. That is what you cannot recall?

A I don't know whether I can't recall that or not. I say I can't recall whether I did or did not have a telephone conversation with him at that time.

Q Up to the time of this executive committee meeting on June 29th, had you obtained any more information, from anyone, more than you already testified about, relating to the basis of the allegations or contentions that you have described as having taken place on June 7th?

A Undoubtedly, Mr. Davis, in the meantime I had learned some factual things relating to this, but I can't tell you what they are at the moment.

Q Nothing comes to your mind other than what you have already testified about?

A Nothing new and startling, no.

Mr. Sonnett: Mr. Davis, I do not know whether this will prove feasible or not, but can we stipulate that on June 10th I asked you to arrange for an interview with Howard Hughes, and that you informed me he was not available for that purpose, and you did not know whether or when he would be available?

Mr. Davis: Mr. Sonnett, I will be glad to [11998] stipulate with you on all the facts you wish to stipulate, but I would rather not do it piecemeal.

What you told me at the time I made an effort to discover what facts you had, and whenever you were ready—

Mr. Sonnett: I did not intend to ask you for a speech. But you asked about the period in which June 10th fell, and I thought that would be one less thing we would have to wrestle around with.

Mr. Davis: I will be glad at any time you want to to enter upon a stipulation of facts, based on this record or anything else that you have to substantiate it.

Mr. Sonnett: I take it Mr. Hughes is still not available. This is a year later.

Mr. Davis: May I proceed, Mr. Rankin?

The Special Master: Yes.

Mr. Davis: I would like to mark for identification at this time what has been furnished to us as the minutes of the executive committee meeting of Trans-World Airlines, of June 29, 1961.

• • •

[12000] Q Now, let me hand you what has been marked as Defendants' Exhibit 109, the minutes of that executive committee meeting.

First, let us confirm those present. They are stated in the minutes. Do you have a recollection of Mr. Cocke, Mr.

Hood, Mr. Leslie and Mr. Pierson and yourself being present?

A That's correct.

[12001] Q And Mr. Breech was absent?

A That's correct.

Q Was he the only member of the executive committee who was absent?

A That's correct.

Q And Mr. Rowe was present by invitation?

A That's correct.

Q I notice that Mr. Sessel also was present by invitation. Will you describe the circumstances under which Mr. Sessel was invited to attend?

A My recollection is, Mr. Davis, that I asked all of the directors who were present in New York to attend, and he was the only one who was able to do so.

Q You did that by telephone calls?

A I believe so, yes.

Q Yourself, or did your secretary do it?

A My recollection is that I did it.

Q Do you recall who it is that you called?

A Mr. Sessel and Mr. Leithead.

Q They were the only two?

A I believe so. I think those are the only two.

Q Were you able to talk to Mr. Leithead?

A I can't specifically remember at this point. My recollection is that he had something that prevented him [12002] from coming, but I can't tell you much more than that at this point.

Q And Mr. Sonnett and Marshall Cox of his office were also present by invitation?

A Correct.

Q Do you know how this meeting of the executive committee was called?

A Yes. I called it.

Q Orally?

A Or I had the secretary call it.

Q Mr. Duckworth?

A Mr. Duckworth.

Q Did you give him any instructions as to what the purpose of the meeting was? Will you describe the circumstances relating to calling this meeting of the executive committee?

A I wanted to have a meeting of the executive committee to take action with respect to the report of the Cahill firm.

As I recall it, I asked Mr. Duckworth to call a meeting. We had one small other matter to take care of, and without having refreshed my recollection, I can't tell you what the notice said, but I don't believe the notice referred to the subject of relations with Hughes Tool [12003] Company.

Q Do you recall whether anyone else was present, someone other than those identified in the minutes?

A Any other people present?

Q Yes.

A No, I don't think there were.

Q Do you recall who prepared the minutes of that meeting?

A Not offhand, no.

Q Looking at the portion which is entitled, "Relations with Hughes Tool Company," it states that you "advised the meeting that the firm of Cahill, Gordon, Reindel & Ohl were now prepared to present a preliminary oral report on the special study that they were making, as a result of the action of the board of directors at its meeting of March 20, 1961, retaining them as special counsel for that purpose."

Do you recall advising the meeting in substance to that effect?

A Yes.

Q Is it accurate that you told this meeting this was a preliminary oral report?

A In substance, yes.

Q Did you intend to imply by that or did you say in [12004] some other way that a written report would follow?

A I don't think so, no.

Q Do you recall just how you said whatever you said in that connection?

A I could not at this point recapture the exact words, Mr. Davis.

Q Do you recall any part of what you said?

A Not over and beyond what is represented by the minutes here.

Q Were you intending to imply at that executive committee meeting that this was preliminary and not final?

A Yes, I was, because at that time we contemplated the possibility that Cahill, Gordon, Reindel & Ohl would give us something in the nature of a final report after having had a further opportunity to explore some of the equitable issues or possible equitable causes of action, which they had not at that point had an opportunity to explore in full, and with regard to which they had hopes of being able to talk to Mr. Hughes or examine Mr. Hughes.

Q You have several times referred to equitable causes of action. What are you referring to or what do you mean by this expression that you use of "equitable causes of action"?

A Perhaps the simplest way to explain it, Mr. Davis, [12005] is the sort of things that are covered in a minority stockholder's suit, where there is a minority stockholder's action.

Q You mean mismanagement, self-dealing, and that sort of thing?

A That's right.

Q I believe you testified before that the decision at the June 7th meeting was that the so-called report of the Cahill firm would be in the form of a draft of a complaint?

A No, Mr. Davis, I am afraid you have misunderstood my testimony or mis-recalled it.

Q You mean that as a result of that June 7th meeting, you still expected to receive or have TWA receive a written report describing the result of the investigation undertaken by the Cahill firm?

A I haven't said, Mr. Davis, that I ever expected to get a written report of that sort.

[12006] Q Look at the next sentence in that paragraph of Exhibit 109, which reads:

> "He stated that on the basis of earlier discussions with members of that firm."

Who are you referring to by members of that firm—Mr. Cahill and Mr. Sonnett?

A Mr. Cahill and Mr. Sonnett, yes.

Q Let me continue:

> "He had informally discussed with a number of the other directors the action that that firm had indicated that the corporation should take at this time, and that all such directors had stated they favored giving the president authority to take such action."

Who were the other directors with whom you had informally discussed this matter, and who had expressed that point of view?

A The directors who were present at the rump meeting following the meeting of June 21st.

Q Do you call that a rump meeting?

A I would so characterize it. Do you prefer some other term?

Q Did anybody keep minutes of that meeting?

A I don't think so, Mr. Davis. No, I am sure, because Mr. Duckworth wasn't there.

[12007] Q And that was a meeting which took place on June 21st?

A That's correct.

Q And all those directors expressed the view that they wanted to give the president authority to take action?

A That's correct.

Q How did that take place? Will you describe that part of the rump meeting?

A Well, as I recall it, Mr. Davis, at the end of the meeting, after this matter had been discussed, the recommendation was made, and I think that I made it, although I wouldn't be sure of that, that the matter should be left in the posture that the president would proceed with such action along the lines of that discussed at the meeting, and at such time as in his discretion he would consider appropriate, it being contemplated that the matter be submitted to the executive committee before anything was actually done.

Q I believe your prior testimony was that the draft of complaint considered at a meeting attended by Mr. Reed and his partner, you there considered a draft complaint that was substantially in the same form as the final complaint. My question is, was that the draft complaint that was considered at the June 21st meeting?

A Not exactly, Mr. Davis. It was pretty close to it, [12008] as I recall it, but my recollection is that it had gone through one more revision prior to the time that we sat down to it.

Q Subsequent to that June 21st meeting with the directors is when you had a subsequent meeting with Mr. Reed and his partner Surbeck?

A That's correct.

Q And at that time you considered with Mr. Reed and Mr. Surbeck a revision of the draft of complaint which had been discussed at the June 21st meeting?

A. As I recall it, it was a very slight revision, although I would have difficulty at this time recalling just what the differences were.

Q And between that time and the executive meeting of June 29th, you did not discuss any of these drafts with Mr. Breech, the chairman of the board and a member of the executive committee?

A I don't recall that I discussed the drafts with Mr. Breech.

Q Or the substance of what was in those drafts?

A If I in fact talked with him on the 28th of June, it's entirely possible, in fact I would say probable, that I described very broadly any changes that had taken place since, I think it was the 12th of June, which was the last [12009] time I believe I discussed the thing in any detail with him.

Q I note that the next paragraph has a statement to the effect that Mr. Tillinghast asked Mr. Sonnett to advise the committee of the status of their investigation, and of their recommendations as to what action the corporation should take at this time. Did that take place?

A Yes.

Q That was an oral presentation?

A It was.

Q Do you recall how long it took?

A Mr. Davis, that is hard to remember. My best recollection would be between half an hour and an hour.

Q The minutes say that Mr. Sonnett advised the committee that the investigation was not yet completed on all phases.

Will you tell us now what it is that was said by Mr. Sonnett as reflected by these minutes?

* * *

[12014] A Mr. Davis, I am not altogether clear in my mind just which facts Mr. Sonnett outlined at this meeting,

because as you know, there were several meetings at which these things were discussed, and it is not easy for me to always distinguish between one and the other in terms of what was said at one and what was said at another. But as best I recall it, without going into any detail as to the persons with whom he had talked, Mr. Sonnett said that this investigation had been made, that it was not complete, that certain things appeared very clearly with respect to the practice which had been followed, and the circumstances which surrounded the acquisition of planes by the company, and the financing of them. And with respect to that facet of things they were prepared to make a recommendation.

He said, however, that with respect to particular acts of wrongdoing, such as that involved in the taking of the 1649 airplane for a period of some months, their investigation wasn't complete, and he was not in the position to say just when it would be complete.

He said that they had hoped and still hoped to be able to talk with Mr. Hughes and get some more of the direct information with respect to certain things of this sort, but whether and when they would be able to do that, he didn't know, and that it was their recommendation that we proceed [12015] with the action represented by the complaint, as to which they were prepared to then give an opinion, and that the question be left open as to what would be done on the other score.

As I recall it, at this meeting there was a discussion of the question of timing. I believe two things were said on that subject, one of which was that in view of the matters that had been publicized in connection with the opposition of the Tool Company to the sale of the subordinate debentures, and the disclosures which it had been necessary to put into the proxy material relative to the observation of the Civil Aeronautics Board in their order approving the voting trust.

He was afraid that the strike suit bar might seize upon this as a fruitful field, and he said that he thought the

handling of this whole matter might be considerably complicated if it became an object of interest by the strike suit bar, and he felt that the institution of an action of this sort at this time might have the beneficial effect, among others, of discouraging such actions.

As I recall it, it was also pointed out at that time that you had been making a lot of noise about instituting actions, that Mr. Hughes had a reputation for instituting them in strange jurisdictions, and that it would be advis- [12016] able to see that any action that was going to be brought was instituted in a jurisdiction of the quality of the Southern District of New York where one could be assured that there would be no opportunity to purchase justice.

Q No opportunity to what?

The Special Master: To purchase justice.

A Then, as I recall it, we went through the complaint page by page, and Mr. Sonnett summarized it as we went along, for the benefit of those who were present.

[12017] By Mr. Davis:

Q Does that about complete your description?

A It does.

Q Who made the statement that Mr. Hughes had a reputation for bringing actions in strange jurisdictions?

A I can't remember. Certainly, Mr. Davis, my best recollection is that it was Mr. Sonnett, but maybe I am wrong.

Q Did he indicate in that connection where Mr. Hughes had ever brought actions in the past, strange or otherwise?

A I don't recall any explanation of the details, no.

Q I notice that the minutes reflect that he answered questions. Did anybody ask him a question as to when Mr. Hughes had started an action against anyone?

A Not that I recall, no.

Q And no one questioned this statement by Mr. Sonnett that Mr. Hughes had a reputation for bringing actions in strange jurisdictions?

A Not that I recall.

Q Do you think you would recall it if a statement along those lines had been made?

A If somebody had asked that question?

Q No, if Mr. Sonnett had identified the nature, or identified any action brought by Mr. Hughes, in any juris- [12018] diction?

Mr. Sonnett: Directly or indirectly? Is that what you are talking about?

Mr. Davis: Yes.

Mr. Sonnett: Personally?

Mr. Davis: Any way you see fit.

Q What was said by Mr. Sonnett at this meeting to support the statement that Mr. Hughes had a reputation for bringing actions in strange jurisdiction?

A I don't remember a statement by Mr. Sonnett in explanation of that.

Q Do you recall his making that same statement at some other meeting?

A Yes.

Q Which other meeting?

A I am not sure which meeting it was. I sort of have a recollection this was the Yale Club meeting.

Q Who was the one who made the statement that it would be desirable to avoid having an action pending in a jurisdiction where justice might be purchased?

A I am not sure, Mr. Davis, but I think it was Mr. Sonnett.

Q Mr. Sonnett. Can you recall what was said, relating to that matter?

[12019] A Not beyond what I have just said.

(At this point, Mr. Kaminer entered the hearing room.)

Q And no one asked any questions?

A Not that I recall.

Q Was anything said about filing the complaint under seal?

A Yes, I think there was something said about that, Mr. Davis.

Q What was said about that?

A I think it was stated that it was proposed to see if we couldn't file the action under seal.

Q Who said that. You say it was proposed?

Mr. Davis: Read me the witness' answer.

(The answer was read.)

Q It would help to the extent to which you can, to identify, when you can, who made various statements.

A Mr. Davis, I will do that so far as I can, but I am sure you will appreciate that it is sometimes very difficult to recall these things. I believe that I made that statement, although it might have been made by Mr. Sonnett.

It was stated, I think by me, that Mr. Reed had had a number of conversations with Mr. Bautzer, that [12020] Mr. Bautzer had expressed a great desire to discuss this matter before any action was filed.

I said that we did not feel that we could be in the position where we advertised that we were going to bring such an action, and then found that an action had been instituted in some other jurisdiction, and for that reason we were not prepared to tell Mr. Bautzer before we brought an action whether, when and where we were going to bring it, but that if there was a genuine interest on the part of Mr. Hughes to reach an accommodation in this action, to find some solution to the problems that existed, we wanted to do

everything we could to facilitate that, and that we had concluded the way to handle this problem was to file the complaint so the action would have been commenced, and then have the complaint sealed, as we hoped it would be, so that we would then have an opportunity to discuss the matter and see if any solution was possible before the thing became public, and before the broad pressures were raised, which unquestionably would happen when it was made public.

Q When was the complaint filed—do you know?

A The next day, on the 30th.

Q Did you authorize the filing of that complaint?

A I did.

[12021] Q When did you do that?

A On the 30th.

Q The day after this executive committee meeting?

A That's correct, yes, sir.

Q Do you recall how you did it—in the morning, by telephone call?

A I believe in a telephone call to counsel, saying that I had heard through Mr. Gilmore some rumor, and I can't remember just what it was at this point, indicative of the fact that the Toll [Tool] Company might be preparing to institute an action out in Los Angeles, and therefore I thought we ought to go right ahead with it and not run that risk.

Q Did you consider Los Angeles one of those strange jurisdictions to which Mr. Sonnett had referred?

A No, I would not consider Los Angeles a strange jurisdiction, but a very inconvenient one from the standpoint of TWA.

Q Do you recall whether it was in the next morning that you called?

A I believe so.

Q By telephone?

A I believe so.

Q Did you talk to Mr. Breech between the time of the conclusion at that executive committee meeting on the 29th, [12022] and the morning of the 30th?

A Not that I recall.

Q What happened between the conclusion of that meeting of the executive committee meeting, and your telephone call of the next morning, relating to the desirability of your exercising your discretion to commence this action?

A Nothing except what I have just mentioned.

Q Your conversation with Mr. Gilmore?

A Yes.

Q That took place when?

A I can't remember exactly when it took place. I think it was probably the morning of the 30th, possibly it was late in the day on the 29th.

Q And Mr. Gilmore is a public relations man?

A He is.

Q Will you tell us what Mr. Gilmore told you?

A I can't remember exactly, Mr. Davis, what he said, except that I know he said that he had just received a report from Los Angeles, and I am quite sure it must have been late in the afternoon before. I can't remember just what the circumstances were, but something that was indicative of possible litigious activity by the Tool Company in Los Angeles.

Q Did Mr. Gilmore indicate whence that report came [12023] from? Who reported it to Mr. Gilmore, do you know?

A I don't know, Mr. Davis, and I am not sure that I knew at the time.

Q Whether or not you knew it at the time, do you know now?

A No, I don't know now. It seems to me he got an inquiry from the Associated Press.

Q You think that is what triggered Mr. Gilmore's feeling to report it to you?

A I think that is what it was, Mr. Davis, yes.

Q And it is your testimony that at the close of this meeting of the executive committee you had no intention whatever of filing that complaint?

A Whose testimony? I didn't say anything like that.

Q I am asking you if it is your testimony, or will you testify to that effect?

A No.

Q At the time of this executive committee meeting you had already made up your mind to file this complaint?

A We knew at the end of that committee meeting that we were going to file it. It was just a question of what the timing was.

Q Did you indicate or disclose to them that you intended to file the next day?

[12024] A At that time I didn't know that I was going to file it the next day.

Q At that time you had no intention whatever of filing it the next day?

A No, Mr. Davis, you keep trying to say things that I haven't said. At the close of that meeting, the state of my mind was that we would file this some time in the near future, but I didn't expect it to be quite as quick as it was.

Q And the only thing that triggered your decision to file this complaint was a conversation with Mr. Gilmore to the effect that he had had an inquiry from the Associated Press, which might indicate that the Hughes Tool Company might start some action in Los Angeles?

A As I recall it, that is what tipped the scale.

Q Was that the only factor which you considered that made you decide to instruct counsel to file that complaint the day following that executive committee meeting?

A No, that is not the only factor that I considered. I considered all the factors that seemed to weigh on this, and

that seemed to me tip the balance in favor of getting this action filed.

• • •

[12096]

[Testimony—July 30, 1962]

• • •

Q Mr. Tillinghast, last Friday you were testifying with respect to the happenings at the executive committee meeting of June 29, 1961.

To assist you in your recollection of what transpired at that meeting, I would like to mark at this time the notes of Mr. Duckworth of that meeting which were supplied to us.

(Photostat of document headed "Exec. Comm., 6/29/61, 11:00 A," consisting of six pages, marked Defendants' Exhibit 110 for identification, as of this date.)

By Mr. Davis:

Q Mr. Tillinghast, while you are looking over what has been marked as Defendants' Exhibit 110, being the notes [12097] of Mr. Duckworth with respect to that meeting of June 29, 1961, I will ask the reporter to mark as Defendants' Exhibit 111 what appears to be drafts of minutes of that meeting in Mr. Duckworth's handwriting.

(Photostat of document headed "Jeddan, 7/31," consisting of six pages, marked Defendants' Exhibit 111 for identification, as of this date.)

By Mr. Davis:

Q Let me hand you what has been marked as Defendants' Exhibit 111. You can identify that as being Mr.

Duckworth's, can you not, addressed to Mr. Pierson?

A I beg your pardon?

Q You can identify what has been marked as Defendants' Exhibit 111 as the handwriting of Mr. Duckworth?

A I think so.

Q And WLP is Mr. Pierson, is it not?

A Yes.

Q While you are looking at Defendants' Exhibit 111 to refresh your recollection, Mr. Tillinghast, let me ask the reporter to mark as Defendants' Exhibit 112 a letter from Mr. Rowe to you, dated July 17, 1961, enclosing a draft of the minutes of the meeting of the executive committee on June 29th.

(Photostat of letter dated July 17, 1961 to Mr. Charles C. Tillinghast, Jr., from Carl S. Rowe, with [12098] enclosure, marked Defendants' Exhibit 112 for identification, as of this date.)

By Mr. Davis:

Q Mr. Tillinghast, I am going to ask you to describe as fully as you can what took place at that meeting, particularly with respect to the transactions identified and discussed by Mr. Sonnett or the Cahill firm.

In that connection; let me refer you to what has been marked as Defendants' Exhibit 111. If you turn to the fourth page of that exhibit you find at the bottom of the page the following notation by Mr. Duckworth:

> "Mr. John Sonnett of the firm of Cahill Gordon outlined for the meeting the scope of their studies of various acts and transactions between TWA and the Tool Company and advised that,"

and then in the photo copy there are some words missing. Can you fill in those missing words?

A How could I fill them in, Mr. Davis?

Q I thought maybe you might have considered the original of that document.

A No, I don't believe I have ever seen this document before this.

Mr. Davis: May I request, Mr. Special Master, that we be provided with the original of the document [12099] of which this photo copy was taken—I mean the original in the files of TWA—so that we can fill in those missing words?

The Special Master: You may.

Mr. Sonnett: We have no objection to that.

Q If you turn the page you will see a continuation from the preceding page, which reads as follows:

"There was a basis for legal action against the Tool Company"—I emphasize this now—"and he described certain transactions on which the opinion was based and also outlined possible courses of action which were available to the corporation."

Now will you tell us what was outlined, what transactions and various acts were described, and what alternative or possible courses of action were mentioned as being available to the corporation?

A In addition to what I have already testified to, Mr. Davis?

Q I am never asking you to repeat anything, but for the purpose of continuity, at this time I would like you to at least identify the transaction if you previously described the transaction. You need not repeat the details of anything you previously testified about.

A Mr. Davis, I doubt that I can add significantly to [12100] that to which I have already testified.

As I recall this meeting, the transactions to which he referred were those principally relating to the procurement of aircraft and the financing of aircraft and the delays in the deliveries of aircraft, about all of which I have already testified.

In addition to that, he, as I recall it, reminded the committee of some of the recent matters relating to positions taken by you and harassment conducted by you and the possible future continuation thereof unless something was done to put a stop to it, and I think I have described these transactions at great length and the record is replete with them.

As I recall it, there was also some mention of the preemption of the 1649 aircraft, about which I have already testified, and these notes of Mr. Duckworth's really do not refresh my recollection sufficiently to enable me to say anything more than I have already said.

> Mr. Sonnett: Mr. Special Master, in the interests of expediting this, I think I have deciphered the language at the bottom of page 4 of Defendants' Exhibit 111. I think those words which are poorly photostated are "In the opinion of his firm there."
>
> If Mr. Davis is agreeable, we can consider that is the text that should appear there and that would appear [12101] from the original.
>
> Mr. Davis: I still would like to have the original.
>
> Mr. Sonnett: You may have it, but I don't propose to let your request for it delay the movement of this deposition. You have known you had a poor photostat for some time.

Q Mr. Tillinghast, in referring to the procurement of aircraft did Mr. Sonnett describe the transaction or transactions which had a bearing on the discussion as to the existence of an antitrust cause of action, or can you

identify the transaction or transactions relating to the procurement of aircraft?

A Not beyond that to which I have already testified, Mr. Davis.

Q You mean your prior testimony constitutes your best efforts at describing or identifying the transactions relating to this so-called violation of the antitrust laws insofar as it relates to the procurement of aircraft?

A That is correct.

Q You testified that Mr. Sonnett also identified or described some transaction relating to the financing of aircraft.

Can you identify or describe which transaction or [12102] transactions relating to the financing of aircraft?

A Not beyond what I have already done, Mr. Davis.

Q Did Mr. Sonnett identify or describe how the delays in the deliveries of aircraft had a bearing on the existence of a so-called antitrust cause of action?

A As I recall it, Mr. Davis, only to the extent that it bore on the damage suffered by TWA, and my recollection is that he stated to the meeting that it had been independently estimated by two different people, Mr. Leslie and Mr. Fellows that the delays in the receipt of jet aircraft damaged TWA in the sum of not less than $35 million.

Q So there was a description or discussion by the Cahill firm at this meeting with respect to the amount of damages suffered by TWA?

A As I recall it, Mr. Sonnett merely stated what the figure was that Mr. Leslie and Mr. Fellows had arrived at.

Q With no description of how it was arrived at?

A I don't recall any description, Mr. Davis, of just how they went about their business of computing the figure.

Q You note that the minutes themselves indicate that Mr. Sonnett answered questions. Were any questions raised with respect to the computation of these damages or identification of what was involved in those damages?

A Not that I recall, Mr. Davis.

[12103] Q Did you understand what the recommendation of the Cahill firm was with respect to the amount of damages?

A Yes. I thought it was quite simple and clear.

Q Will you describe your understanding, then, of the damages involved which you understood had been suffered by TWA by reason of these alleged violations of the antitrust laws?

Mr. Sonnett: I object to that, Mr. Special Master. Mr. Davis keeps overlooking the fact that there was a draft complaint which was read by everybody present. The witness' prior testimony is that there was discussion of various of the allegations of that complaint.

What Mr. Davis is really asking the witness to do is to argue with him about the allegations of the complaint then under consideration by the executive committee.

The Special Master: You may state your understanding.

The Witness: What is the question? Would you read the question back? I am confused.

The Special Master: Read the question to the witness, please.

(The question was read.)

A My understanding, Mr. Davis, was that by reason of [12104] the delay in the receipt of the jet aircraft TWA's competitive position had suffered, that its share of the market had decreased, that American and United had been able to secure market positions due to the fact that TWA did not have jets with which to compete with them for those markets, that TWA's scheduling and planning had been in a state of upset and turmoil for some period of

time because of not being able to plan with definiteness as to what equipment there would be and when it would be available, and that there had been a very substantial amount of unnecessary training costs incurred as a result of training crews to fly planes that didn't arrive to be flown, and there were possibly some other aspects of it which don't come to mind at the moment, but my understanding was that independently Mr. Leslie and Mr. Fellows had arrived at an estimate of what these damages amounted to, and each had independently come to a figure of around $35 million.

[12105] Q And it was your understanding that what you have described are the damages suffered by TWA by reason of these antitrust violations?

Mr. Sonnett: I again object to that as calling for a conclusion of the witness. It does not relate to what was said at this meeting, what was alleged in the complaint, or anything of the kind. This is purely argumentative, and I submit the witness, who was not around for a good deal of the time in question, is not qualified as an expert on the subject of damages.

The Special Master: Are you limiting this to the meeting, and what was said at the meeting?

Mr. Davis: His understanding of the recommendation or statements made by counsel at the meeting should reflect whatever he understood by reason of whatever he had done prior to the meeting, being the person on whom the responsibility was left as to the filing of the complaint.

I would just like to understand what this witness understood he was doing.

Mr. Sonnett: I think once again the record has to be corrected. Mr. Davis misstates it.

The witness was given the decision to file with [12106] concurrence of the executive committee, and left to make the decision as to the time of filing. That is pursuant to authority of the board and authority of the executive committee.

In the second place, Mr. Davis is engaged in an argument with the witness on the subject of damages.

If he wants to get into the question of who said what at the meeting, what the allegations of the complaint are, and he wants an argument about that, I will be happy to oblige him. But I don't think this is proper discovery. This is argument.

What was said is one thing. The witness' understanding is immaterial. TWA's position is expressed in the complaint. It isn't going to be varied by any understanding or lack of understanding on the part of this witness.

Mr. Davis: May I pursue this question of damages a little bit for the Special Master, because I see that Mr. Sonnett is bound to take up as much time as he can on the record arguing now.

By Mr. Davis:

Q Mr. Tillinghast, did you ever discuss with Mr. Fellows or Mr. Leslie the estimate to which you have referred?

[12107] A No, I did not.

Q Prior to this meeting on June 29th had you made or asked that TWA make any kind of a study to determine the extent to which TWA had been injured by reason of what you have previously described?

A No, I did not.

Q Did you ever discuss with any officer or director of TWA the desirability of undertaking some kind of a study to discover to what extent if any TWA had been injured by reason of these things that you have identified?

A No, I did not, Mr. Davis. I was aware that special counsel were discussing with representatives of TWA, in my opinion, appropriate representatives of TWA, the question of damages, and I didn't think that any good purpose would be served by my trying to do the same thing.

Q Do you know or can you identify any undertaking by any personnel of TWA to determine for use by TWA the extent to which TWA may have been damaged?

A You mean apart from use in connection with this lawsuit?

Q No. I am trying to find out whether or not TWA, under your leadership, ever made an effort internally to determine the extent, if any, to which it had been damaged by reason of these transactions or delays or whatever you [12108] have identified as your understanding of the cause of action.

Mr. Sonnett: Except as already testified. I guess we continue that ground rule.

A I presume you mean, Mr. Davis, other than those to which I have already testified.

Q Yes.

A No, I know of none other than those to which I have already testified.

Q So far as you know, neither you nor any other officer of TWA has made an effort to discuss with Mr. Fellows or Mr. Leslie the basis or theory or adequacy or lack of adequacy of the estimate that they arrived at, is that correct?

A I am not aware of any such discussion.

Q You say at that meeting there was a reference or description—

A Excuse me. May I break in here, Mr. Special Master, to correct the record, because in some of the colloquy here I think there was a slight confusion as to what I was saying.

When I referred, Mr. Davis, to the various things that bore on damages, I don't want to give the impression, which I may have, that those things were the subject of [12109] discussion at the executive committee meeting. I do not recall at the executive committee meeting that there was anything more than the statement by counsel of the amount of these estimates.

I do not recall any particular discussion of how they were arrived at or what was taken into account or how TWA suffered damage.

In view of the colloquy, I wouldn't want the record to give the impression that I was saying that these things were discussed at that meeting.

Q There was no discussion whatever at the meeting on damages, is that correct?

A I don't recall anything more, Mr. Davis, than that the amount of damages was stated by Mr. Sonnett, and the fact that Mr. Leslie and Mr. Fellows had made these separate studies.

Q You testified that at that meeting Mr. Sonnett reviewed some of the positions taken by the Tool Company or some of its representatives or its counsel and described or referred to what you termed the harassment which had taken place. You remember your testimony in that regard?

A Yes.

Q In that connection, was there a reference made to any communication other than one which has already been [12110] identified in your testimony?

A Not that I recall, Mr. Davis.

Q What was the discussion as to what had to be done in order to put a stop to this possible annoyance in the future?

A Well, one thing, the only thing, I guess, that I recall on that, Mr. Davis, was that Mr. Sonnett pointed out that he considered it important to be in a position to enjoin any

such action if it continued, and one of the reasons why he felt that we ought to institute the antitrust action with the count of interference, current interference in the business of TWA, was so that if this continued, and if any continued serious effort was made to unhinge the Boeing deal, we would be in a position to get a temporary restraining order or a temporary injunction enjoining the Tool Company from interfering with the business of TWA.

Q You see, still referring to Defendants' Exhibit 111, what appears in the next paragraph, which reads:

> "After lengthy discussion of the matter including an expression of opinion by Mr. Carl Rowe as counsel for the corporation that a basis existed for the filing of a claim against the Hughes Tool Company,"

and then their [sic] follows a motion for a resolution. [12111] What was the expression of opinion of Mr. Carl Rowe, can you describe what was said?

A Mr. Davis, I don't recall an expression of opinion by Mr. Carl Rowe. Mr. Rowe was there, he participated in the meeting, and it is my recollection that he acquiesced in the recommendation of Mr. Sonnett.

Beyond that, I don't recall any expression of opinion by Mr. Rowe.

Q Is that your best recollection, Mr. Tillinghast?

A Yes, it is.

Q Will you refer to what has been marked as Defendants' Exhibit 110, and look at the third page, where Mr. Duckworth's notes taken during the course of the meeting read:

> "TWA counsel opinion: Agrees to filing of suit. Expressed difference of opinion on whether should be antitrust or minority shareholder type of action."

A Yes.

Q Does that help you in any way, Mr. Tillinghast?

A To some degree, Mr. Davis. As I have already testified, there was some question from the beginning as to whether or not the antitrust type of action or the—or what, if any, I will refer to as the equitable type of action would better suit the needs of the situation, and [12112] as I recall it, Mr. Rowe had leaned toward the latter, for the reason that there were, in his opinion, fewer technical problems, of a nature which I have already described, involved in that approach to the problem, and while I don't have really an independent recollection of just what he said at this meeting, I would presume from this that he had expressed that viewpoint there, and said, in effect, that if it were his choice, he would make the other choice, but he thought this suit was a proper suit, and would agree that the corporation should file it.

Q I note that the minutes themselves refer to the fact that Mr. Sonnett answered questions. Have you any recollection as to what questions Mr. Sonnett answered?

A Not beyond the testimony I have already given, Mr. Davis.

Q Have you now given us your full and complete and total recollection of what transpired at that meeting?

A I have.

Q Will you look at Defendants' Exhibit 110? It indicates that the meeting started at 11 o'clock in the morning. Is that in accordance with your recollection?

A Oh, yes, I believe that is correct.

Q At 12:45 Mr. Sessel left?

A Yes.

[12113] Q Are you clear that Mr. Sessel left after the resolution presented to the meeting was adopted?

A No, I am not, Mr. Davis. Mr. Sessel may have left—

Q Before that?

A Well, this would—all I can tell you—I really have no independent recollection of it—all I can do is say what I deduced from Mr. Duckworth's notes, which I see before me. So I would just be guessing at it, Mr. Davis. But Mr. Sessel was not a member of the executive committee. He was there as a matter of courtesy, about which I have already testified, and that he may have left before formal action was taken would not surprise me in the least, if that is in fact what happened.

Q Mr. Duckworth's notes also indicate Mr. Hood left at 12:50, five minutes later.

Do you have any recollection of Mr. Hood leaving?

A No, I don't, Mr. Davis. I am sorry.

Q Do you know who made the motion that the president should be authorized to proceed when in his judgment the filing of the complaint was timely?

A No, I couldn't recall at this point who did make that motion.

Q What was the discussion with respect to the [12114] granting of the authority to the president to file this action when in his judgment the filing was timely? Was there any discussion about that at all?

A Yes, there was, Mr. Davis, and I think I have described a good deal of it in my prior testimony.

My recollection is that somebody, and I may have been the one, I can't be sure, said that in view of the threats that were being made by you relative to the possible institution of suit, and in order to be in a position promptly to obtain some sort of injunctive help in the event that you should take any further steps of a damaging nature, which might threaten to unhinge the Boeing deal, that the president should be in a position to move with great dispatch should it seem necessary to do so.

Q Is it fair to say, then, that the sense of the meeting was that you should have available to you a complaint prepared by special counsel which could be used for the

purpose of preventing the Tool Company from interfering with the Boeing deal if that should prove to be necessary?

A Among other things, yes.

Q What do you mean, "among other things"; wasn't that the principal purpose or objective of this complaint, type of complaint?

[12115] A That was one of the purposes of it, Mr. Davis. I wouldn't say that that's the principal purpose, and I think my testimony makes it clear that that was one of a number of considerations. An important one, but not by any manner or means the principal—

Q In connection with this discussion as to whether this should be an action such as a minority stockholders action, or as you call it, an equitable action, or whether it should be an antitrust action, wasn't the discussion which took place based upon the kind of temporarily injunctive relief that might be obtained depending upon which type of action was brought, isn't that what took place?

[12116] A My recollection is, Mr. Davis, that counsel expressed the view that it would be simpler to get that type of relief in the antitrust type of action, in which the issues were broader and a little clearer cut, but I am quite sure that counsel didn't suggest that that was the only type of action in which injunctive relief could have been brought.

Q I am sure he did not suggest that that was the only type of action as to which injunctive relief could be sought. But my question to you is isn't it a fact that what took place at that meeting was your statement, in effect, that it would be desirable to have the president authorized to file an action should it develop that the Tool Company was about to take steps interfering with the so-called Boeing program? Isn't that in effect what you—

A No, I wouldn't think that that was a fair characterization, Mr. Davis.

Q In your prior testimony you referred to a threat made by me as counsel for the Tool Company relative to the institution of a suit. This is the first time you described it that way.

Will you please identify what you are referring to?

Mr. Sonnett: I object to the form of that [12117] question.

Mr. Davis: To my recollection, it is the first time.

Mr. Sonnett: It is a misstatement of the record. Mr. Davis' threats about suit were implicit and explicit in the documents he was writing from the outset.

Mr. Davis: Mr. Special Master, may I have the answer of the witness and not of counsel? It is the witness who testified. If that is the answer to the question, I will take it from the witness. I will take it from Mr. Sonnett if he wants to testify.

But I don't understand that that is an objection. May I have the answer of the witness?

Mr. Sonnett: It is an objection to your misstating the record.

The Special Master: I will sustain the objection.

Mr. Davis: Let me restate the question this way:

Q A moment ago you referred to a threat relevant to the institution of a suit by the Tool Company. Will you please identify the threat to which you refer?

A Mr. Davis, I think I also referred to those threats [12118] in my earlier testimony, and I just have to say that beginning with the letter to the SEC, in which you suggested that you might have to challenge this, that and the other thing, I had the feeling, I think everyone else had the feeling, that you were, in effect, threatening to bring legal action to set aside the Boeing deal and to do a variety of other things, and whether or not you really meant it we

didn't know, but we were uncomfortable in the thought that maybe you did mean some of these things.

Q You were referring, then, to the communications received by you, or TWA, which have been previously identified, as to which you have testified about?

A Yes, Mr. Davis, and there may have been, and I can't be specific about it at the moment because I can't recall it specifically, but there may have been some overtones of your discussion—from your discussions with Mr. Reed and others that helped to reinforce the feeling that you might be contemplating some sort of an action.

Q Will you identify the discussion with Mr. Reed prior to June 29th to which you are referring?

A Mr. Davis, I just said that I can't be specific. I am just saying that I have the feeling that the state of mind at that moment was colored, among other things, by the playback that I was getting of your conversations with [12119] Mr. Reed, and I can't be any more specific than that. I am sorry.

Now, Mr. Davis, I have got to correct a prior answer, if I may. You asked me if that was all that I could recall about the meeting of the executive committee, and from looking at Mr. Duckworth's notes here I do recall that there was some discussion as to the 1649A situation.

Q That is, after Mr. Sessel left?

A Well, this would indicate that it was after Mr. Sessel left. I cannot recall it in relation to when Mr. Sessel was there or wasn't there, but I do recall, aided by this, that there was some discussion of the 1649A situation, and of whether there was any basis for including that in the complaint.

Q Is that your total recollection with respect to the 1649A that was discussed at the meeting?

A Well, it's not my total recollection, no, but I just wanted to correct what I had previously stated, to the effect

that I testified to everything that I could recall that happened at this meeting, because now I remember that there was an additional discussion.

Q Give us your complete and total recollection as to the discussion relating to the 1649A.

[12120] A My recollection, Mr. Davis, is that I raised the question of whether there might be a specific complaint related to the 1649A's, based on discussions that I had had with Mr. Rummel, during the course of which he had told me that he had been very, very much against the 1649s, that he had thought the ship would turn out to be a poor one, and an uneconomic one to operate, and that this had become true, and that he never could understand how Mr. Hughes had bought the 1649s.

As I recall the meeting, both Mr. Leslie and Mr. Cocke said that we had better not complain about that because at least part of the management of TWA had been very anxious to get the 1649s, and that this was far from a one-sided situation.

Beyond that, I don't recall the discussion, but that's the substance of what I do recall.

Q In that discussion with Mr. Leslie and Mr. Cocke, didn't they in effect say that Mr. Hughes in fact had been opposed to the 1649, but the management of TWA had insisted that is the ship they wanted?

A I don't recall, Mr. Davis, that they said that Mr. Hughes was against it. They did say that at least some of the people, and I can't identify them beyond that, had been very anxious to obtain the 1649s.

[12121] Q Now are you satisfied that you have fully and completely described what took place at that executive committee meeting in connection with this lawsuit?

A No, I am not, Mr. Davis. I am sure that I haven't described everything that took place. I have merely described everything that I can recall at this time.

Q If you will refer to Defendants' Exhibit 112, you will see that Mr. Rowe sent you a draft of the minutes of this meeting of the executive committee.

Do you recall what you did with respect to the minutes of that meeting?

A I don't distinctly recall, Mr. Davis. I presume I passed them along to Mr. Duckworth. But beyond that, I don't particularly recall.

Q You don't recall making any comments or reviewing or revising them in any way?

A No, I do not.

Q Do you recall or do you know whether or not Mr. Sonnett made any comments or revisions?

A I do not.

Q Did you discuss the minutes with Mr. Reed?

A I don't believe so, Mr. Davis. I would be reasonably certain that those were not discussed with Mr. Reed.

Q At that meeting, Mr. Tillinghast, didn't you tell [12122] the executive committee why Mr. Breech was absent?

A I don't recall having told them why he was absent.

Q Why was he absent, do you know?

A Because he wasn't in town, as I recall it.

Q Didn't you call him to tell him about this meeting that you were having, the purpose of it?

A Mr. Davis, I am sure that Mr. Breech was advised as to the purpose of the meeting, whether or not I personally called him, but Mr. Breech has attended very few if any executive committee meetings since I have been president of TWA, and this one, in that regard, would be no exception from the ordinary.

Q That is not my question. I am asking whether or not you recall discussing this with Mr. Breech.

A What do you mean by "this"?

Q This meeting, the purpose of the meeting, the commencement of the lawsuit, the action taken at the meeting.

Did you have any conversation whatever with Mr. Breech with respect to the action taken or to be taken at this executive committee meeting of June 29th?

A Well, now, Mr. Davis, you have asked me about three questions, and let me see if I can answer them.

I have already testified at least once that I do not have a distinct recollection of a discussion with Mr. [12123] Breech, but that it's highly probable that I did communicate with him and tell him what was coming up at the meeting, and give him an occasion, an opportunity, to comment upon it, and although again I have to say I just don't have any specific recollection of it, I have no doubt that Mr. Breech knew that this meeting was going to take place, and knew what we were going to consider at the meeting.

Q After the meeting did you discuss it with Mr. Breech?

A How long after?

Q I don't know. When did you, did you?

A Well, I certainly have discussed at various times with Mr. Breech the fact that we instituted a lawsuit.

Q When is the first time that you recall discussing with Mr. Breech what had taken place at this meeting of June 29th?

A I am not sure, Mr. Davis, that I ever discussed what took place at the meeting on June 29th, except that the meeting had authorized me to file a complaint as soon as I considered it appropriate to do so.

Q And the next morning you filed the complaint. My question is when did you tell Mr. Breech of the authority granted to you, your decision, and the reasons for your decision.

A Mr. Davis, I think you are incorrect in saying when it was filed. I don't think it was filed the next morn- [12124] ing. But that's not important.

My recollection is that I sent a copy of the complaint to each of the directors with some sort of covering note saying

that it had been filed, and I don't recall I had any special or particular conversation with Mr. Breech, although perhaps I did. If I did, I have no recollection of it at this time.

Q Do you recall mentioning it to or informing Mr. Reed of your action?

A No, I don't, Mr. Davis.

Mr. Sonnett: This may be a good point, Mr. Rankin, to produce for your inspection two documents, being communications from me to Mr. Tillinghast, one of June 27th, which I submit is privileged even on the present state of the record, the other of June 29th, where you may conclude under the rulings you have made that it is no longer privileged. In light of the dates now being examined about, I think I should submit them.

Mr. Davis: I thought we were going to have Tuesday as—

Mr. Sonnett: I do this because if the Master should conclude you are entitled to see one of these you may want to see it now, since it relates to the [12125] meeting of June 29th, and in the interests of expediting your deposition.

Mr. Davis: Shall we have our morning recess while you consider that question?

The Special Master: Fine.

(Whereupon, a short recess was taken.)

The Special Master: Mr. Sonnett, Mr. Davis, I am ready to rule that the letter from Mr. Sonnett to Mr. Tillinghast dated June 29, 1961 is producible at this time, and the letter of June 27, 1961, to and from the same parties, is not producible at this time.

Mr. Davis: May I have marked, then, as Defendants' Exhibit 113 this letter which has been handed to me.

(Letter dated June 29, 1961, to Charles C. Tillinghast, Jr., from John F. Sonnett, marked Defendants' Exhibit 113 for identification, as of this date.)

[12126] Mr. Davis: Has it been marked?

The Special Master: Yes.

Mr. Davis: May I have photo copies made of it, and I will ask you some questions later on—

The Witness: Let me just finish reading the last paragraph.

Mr. Davis: May I have marked for identification a letter from Mr. McCone to Mr. Tillinghast, dated July 5, 1961, as Defendants' Exhibit 114.

(Photostat of letter dated July 5, 1961, to Charles C. Tillinghast, Jr., from John Alex McCone, marked Defendants' Exhibit 114 for identification, as of this date.)

By Mr. Davis:

Q Mr. Tillinghast, can you identify what has been marked as Defendants' Exhibit 114 as a letter you received from Mr. McCone under date of July 5, 1961 as his acknowledgment of your letter to him of June 30th enclosing a copy of the complaint?

A Yes.

Q Did Mr. McCone subsequently communicate with you with respect to the complaint as he indicated he would in the first paragraph of the letter?

A Offhand, Mr. Davis, I don't recall any communication from Mr. McCone relative to the complaint until the time of [12127] one of the July directors meetings, I think the regular July directors meeting, but I wouldn't be positive.

Q Look at the second paragraph of the letter, which reads:

"Until then, I would like merely to state my position which I have reflected to you and to Mr. Breech by telephone."

What is the position which he had reflected to you and to Mr. Breech by telephone?

A What he says right there, Mr. Davis, in that same paragraph.

Q When did that telephone conversation take place?

A Oh, I don't know, Mr. Davis. As I think I have testified earlier, I had, over this whole period of time, several telephone conversations with Mr. McCone. I can't at the moment recall exactly when the telephone conversation was to which he alludes here.

Q Look at the next to last paragraph.

"While I have known of the Cahill report and recommendation, I was surprised to learn from Mr. Breech yesterday that a complaint had actually been filed."

When did Mr. McCone learn of the Cahill report?

A Well, now, I am not sure of that, Mr. Davis. I am afraid I would have to refresh my recollection.

[12128] Q Please do.

A If I could refresh my recollection as to the people who were at the June directors meeting—

Q To my understanding, Mr. McCone is not reflected by those minutes as having attended that meeting.

A Well, if he was not at that meeting, and if I didn't have a visit from him in the interim, he very likely got it from me over the telephone.

May I look at Miss Zacarese's calendar there? Maybe that will—

Q Referring to Defendants' Exhibit 4 (handing to witness). Have you got a copy of it?

A No, I don't, Mr. Davis. I am sorry.

Mr. Davis, I can't be sure, but I presume from reading his letter, and from the fact that he was not at the July board meeting, that he must have learned about it from a telephone conversation with me.

Q And you have no recollection of that telephone conversation?

A Not—

Q Or the substance of it?

A Not specifically, no.

Q Can you identify the Cahill report to which he is referring?

[12129] A Really, that which in substance is embodied in the exhibit which was just marked—

Q Are you referring to the opinion letter of Mr. Sonnett?

A Yes, I am.

Q I thought that was an opinion letter which was handed to the executive committee on June 29th. Did you have a prior opinion?

A Mr. Davis, I said the substance of that. Not having known what—not having known when I talked with Mr. McCone, I cannot relate it to when that formal opinion letter was delivered, but I think, as my prior testimony had indicated, this was not the first time we knew what the recommendations of the Cahill firm were going to be.

Q Do you know how Mr. McCone learned of the recommendation of the Cahill firm?

A I have just been going through that, Mr. Davis.

Q As distinguished from a report?

A Well, there was no recommendation as distinguished from a report. It is one and the same thing.

Q You notice Mr. McCone is writing to you that while he had known of the Cahill report and recommendation nevertheless he was surprised to learn from Mr. Breech that a complaint had been filed.

[12130] Can you explain, based upon whatever communication you had with Mr. McCone, how Mr. McCone could have been aware of the Cahill report and recommendation and nevertheless been surprised that a complaint had been filed?

A Well, yes. That seems to me, from what I have already said, to be quite obvious and simple, that he knew the—from conversations with me—the general position that the Cahill firm took, and had not known of the actual filing of a complaint until he heard it from some conversation he had with Mr. Breech.

Q Do you know the nature or substance of the conversation he had with Mr. Breech?

A No, I do not, Mr. Davis, beyond what is revealed here.

Q And you have no other explanation to give as to why Mr. McCone should have been surprised that a complaint was filed even though he was familiar with the Cahill report and recommendation?

A I presume, Mr. Davis, that he is talking about the timing of it, and that he was surprised that it had actually happened quite so fast.

Q Did any other director express the same surprise to learn of your action in filing the complaint?

A Not that I recall, Mr. Davis. I don't think so.

[12131] Q Mr. McCone is the only one who reacted in the manner indicated by Defendants' Exhibit 114?

Mr. Sonnett: I must say that that is a rather difficult question. He is asking reactions, possible reactions, by others, and trying to equate them to whatever this is, and how he defines Mr. McCone's reaction in this, I don't know.

The Special Master: I think the form is bad.

Q Did any other director, in substance, express to you the sentiments expressed by Mr. McCone in that paragraph I have read to you, namely, surprise?

A Not that I recall, Mr. Davis.

Q You think you would remember if any other director had expressed surprise?

A Well, it may be that—I have a vague recollection that either Mr. Leslie or Mr. Cocke, I can't remember which, when advised of the fact that the complaint had actually been filed the next day, said something to the effect "Boy, you really moved fast," and to which I replied "That is true," and then I related this report I had received from Mr. Gilmore, about which I have already testified, and said in view of that, in view of the fact that the complaint seemed to be pretty well firmed up, I thought it was, and I believe, if I recall correctly, the fact that I was [12132] planning to be away over the 4th of July, I thought the wise thing to do was to get this behind us.

Q Still looking at Defendants' Exhibit 114, that same paragraph, you note that Mr. McCone appears to be expressing surprise to learn that this action was taken by resolution of the executive committee.

Did any other director express surprise that the executive committee had taken the action which they took?

A Not that I recall, Mr. Davis.

Q You see the last sentence in the letter indicates that he will read the complaint and looks forward to discussing it with you the following week in New York.

Your prior testimony is you don't recall any such meeting and discussion, is that correct?

A I don't at the moment, Mr. Davis. It may have taken place, but I just don't have a recollection of it.

Mr. Davis: May I have marked for identification this document as Defendants' Exhibit 115.

May I call to the attention of the Special Master that Defendants' Exhibit 114 and 115 were received by us on July 27th of this year.

Mr. Sonnett: I haven't seen it yet, Mr. Davis, and I don't know whether this is something that you had a photostat of earlier or not. But subject to [12133] correction, we will take your statement as correct.

The Witness: Mr. Special Master, or Mr. Davis, while thinking about this, I recall one thing that came up at the meeting of the 29th, I think, about which I don't think I have testified, and if you want to remember to ask me about that, that will—

Mr. Davis: Give it to me now.

The Witness: (Continuing)—that will add to the completeness of my testimony.

Q Give me your additional recollection as to the meeting of the 29th, Mr. Tillinghast.

A As I recall it, Mr. Davis, and I don't think I have touched on this before, maybe I have, there was some discussion of the sealing of the complaint, and of the fact that Mr. Reed had had discussions with Mr. Bautzer, about which I have testified before, relative to Mr. Bautzer's desire to sit down and discuss some disposition of any claim which TWA might have against the Tool Company or Mr. Hughes, and that Mr. Reed had told Mr. Bautzer that he thought this would be a good idea, and he would do what he could to make this possible.

It was further stated, by whom I don't recall, possibly by myself, that we didn't feel that it was safe to be in the position of having a complaint that we were going to [12134] file but hadn't filed, so that if we got into settlement discussions we might be scooped by the institution of some action somewhere else, and that the Cahill firm were hopeful that they would be able to get the complaint sealed, and thus make it possible really to achieve both objectives, the first of discussing any possible settlement, and secondly,

the avoidance of perhaps being drawn into an action of a different nature in a different forum.

My recollection is that there was some discussion of the likelihood of being able to work out any settlement, and someone, again, perhaps myself, pointed out that since the voting trust had been set up there had been a number of abortive discussions by Mr. Breech and others of possible settlement of outstanding differences, and that I thought one might be optimistic to think that this particular settlement discussion that Mr. Bautzer was suggesting would be any more productive than any of the prior ones had been, but that until there was some pressure of time or pressing issue that had to be resolved, I thought it very likely that Mr. Hughes' well known proclivities for procrastination would put off the facing up to this issue.

That is about as much as I can remember about it, but I think at least some of that is over and above what I recalled before.

[12135] Q You referred to Mr. Breech and others having discussions. Can you identify the others and what you are referring to a little more clearly?

A I think I have already testified, Mr. Davis, so far as I am familiar with or presently recall those discussions. To answer your specific question, I believe Mr. Olds participated in one of them, and—

Q With whom?

A I believe that Mr. Breech and Mr. Olds and Mr. Reed talked more than once with Mr. Holliday, and talked on at least one occasion with Mr. Odlum, that Mr. Reed, at least, and perhaps Mr. Breech as well, had talked with Mr. Bautzer. I am not too clear as to the detail of that, but I know there were several discussions aimed at trying to achieve a rapprochement and a modus vivandi under the voting trust.

Q Are you referring to meetings that took place between Mr. Breech and Mr. Olds on the one hand and Mr.

Bautzer and Mr. Holliday on the other hand after the complaint was filed, sometime during the course of July?

A No, Mr. Davis. All of these were prior to your entrance into the picture, as I understand it, except for the fact that after your entrance into the picture I believe Mr. Reed's discussions with Mr. Bautzer continued to some degree, and all of this antedates the filing of the complaint.

[12136] Q Now will you refer to what has been marked as Defendants' Exhibit 115, and I ask you if you can identify that as a note you received from Mr. Breech.

The Special Master: It hasn't been marked yet.

(Photostat of memo to "Charlie," from "ERB," marked Defendants' Exhibit 115 for identification, as of this date.)

A I can identify that as a note which I received from Mr. Breech.

Q You note the date "July 7, 1961, President's Office." Does that indicate to you that you received that on or about July 7, 1961?

A Yes.

Q You notice that in what has been marked Defendants' Exhibit 114 Mr. McCone refers to a telephone conversation with Mr. Breech.

Will you tell us whether or not you discussed with Mr. Reed the telephone conversation between Mr. McCone and Mr. Breech?

A Mr. Davis, I am a little at a loss here, because I am not sure what the attached is.

I previously testified about a telegram that Mr. McCone sent to Mr. Breech. I don't know just when that was, but if that was about this time, maybe that's what this [12137] refers to.

Q Among the documents that were made available to us for the first time on July 27, 1962, we were furnished

with a copy of a telegram from Mr. McCone to Mr. Breech dated July 2, 1961, which I will ask be marked as Defendants' Exhibit 115A. Perhaps that will refresh your recollection.

(Photostat of telegram dated July 2, 1961, from John A. McCone, marked Defendants' Exhibit 115A for identification, as of this date.)

Q Can you identify whether or not Defendants' Exhibit 115A is the document attached to Defendants' Exhibit 115?

A Mr. Davis, I am reasonably certain that 115A is the document referred to in Exhibit 115 as "the attached."

Q Will you tell us what Mr. Reed told you about Mr. Breech's call to Mr. McCone relating to that telegram?

A Well, frankly, Mr. Davis, I don't recall a discussion about this with Mr. Reed, but I do recall a discussion with Mr. Breech.

[12138] Q Will you tell us your recollection of your discussion with Mr. Breech?

A If I recall correctly, Mr. Davis, some weeks ago I mentioned this telegram in some earlier testimony.

Q You know that there was a different telegram from Mr. McCone which was marked, which is different from this one, which was never marked, and which we never had until July 27th?

A Could you show me the other telegram so that I am clear that I am talking about the right one?

Q The other telegram was a telegram which was annexed as part of Defendants' Exhibit 21, and which was a telegram from Mr. McCone to you under date of June 21st.

A No, I am talking about a telegram to Mr. Breech. That's a telegram to me.

I am quite sure I have this adequately identified in my mind. I believe, Mr. Davis, if I recall correctly, that some

time before I talked with Mr. Reed about this I talked on the telephone with Mr. Breech, and he was very irritated about this telegram from Mr. McCone, as I have, I think, already testified.

I can't remember the exact conversation with Mr. Breech, but he recited the fact that he had received this telegram and he had called Mr. McCone and told him very [12139] plainly that he shouldn't go sending telegrams unless he knew what he was talking about.

Mr. Breech was very upset about the fact that Mr. McCone had apparently taken it for granted that he hadn't made any effort to try to work these things out, and I recall, without being able to remember all the detail, he recited the various efforts that he had made with Holliday and Odlum and Bautzer to try to work something out, and said, in effect, you can't work these things out unless you have a desire on the other side to work them out, and he said "I have talked with Holliday I don't know how many times, and Holliday is very frank in admitting that all he can do is do what he is told to, and we had an agreement with him on directors, and he very frankly said he had to welch on that," and he said, "I don't know how anyone could do more than I have done to try to find some constructive means of working this out, and McCone should have known better than to send me something like this."

He said "He has spent too much time in government, and seems to be more interested in making a record for his own purpose than in trying to get something constructive accomplished."

He went on, as I recall it, to say that he would be [12140] happy to meet with Holliday and anyone else who had authority to do something, and a constructive desire to do it, and as I recall it, I may be wrong, he said "Hell, I didn't get Davis into this thing."

He said "Hughes is the fellow that got Davis in this, and now all we get are a whole series of letters and pub-

licity trying to put the heat on us, and I don't know what I possibly could have done more than I already have to try to work this out, and I told that to McCone, and I just wonder what he is thinking about," or words to that effect.

That is my recollection of what Mr. Breech had to say about the subject matter.

Q Did Mr. Breech also tell you what Mr. McCone said?

A As I recall it, he said very, very little about what Mr. McCone had said. His conversation was sort of preoccupied with saying what he had said to Mr. McCone.

Q You will note that the telegram from Mr. McCone to Mr. Breech was dated July 2nd, and after the lawsuit had been started.

A That's correct.

Q And on the face of the telegram from Mr. McCone it would seem that Mr. McCone was not yet aware of the commencement of the lawsuit.

[12141] A I think that's probably true.

Q Do you recall whether or not Mr. Breech discussed with Mr. McCone or told him the lawsuit was started based upon the recommendation of the Cahill firm, and discussed that recommendation, et cetera?

A Mr. Davis, I don't remember what, if anything, he said in that regard.

Q Is it your understanding that Mr. Breech, when having a telephone conversation with Mr. McCone after July 2nd, was still discussing with Mr. McCone the problems of negotiating a settlement?

A He was describing, as I recall it, all of the frustrations—strike that.

He was discussing, so far as I recall it, all the efforts that he had made to try to work something constructive out, and the frustrations that he had experienced in trying to do this, and had expressed, as I recall it, his willingness at any time to sit down on a constructive basis and try to work these things out.

Q Mr. Tillinghast, for the purpose of refreshing your recollection, let me point out to you the time sequence. On July 2nd Mr. McCone sends a telegram to Mr. Breech. Mr. Breech thereupon has a telephone conversation with Mr. McCone. Mr. McCone, on July 5th, writes to you and [12142] refers to a telephone conversation with Mr. Breech, and with you, and refers to the Cahill report and recommendation and expresses surprise at the commencement of a lawsuit.

Does that help you to refresh your recollection as to whether or not Mr. Breech in that telephone conversation with Mr. McCone discussed the so-called Cahill report and recommendation and the basis or justification or reasons for the commencement of this lawsuit?

A Discussed it with me?

Q No, discussed it with Mr. McCone, and thereafter told you about it.

A Mr. Davis, the only thing I can tell you is what I have already testified relative to my conversation with Mr. Breech. It is very clear in my mind that Mr. Breech was hopping mad about Mr. McCone's telegram, and relieved himself of that feeling over the phone at some length, and I don't remember much of anything else that he had to say.

Q You don't recall a discussion of that matter with Mr. Reed?

A No. I am inclined to think, Mr. Davis, that I had had my telephone call with Mr. Breech before I actually received the papers which are Defendants' Exhibit 115 and 115A; and my recollection is that these came in after I had [12143] had my telephone conversation, and that as a consequence the note which is Defendants' Exhibit 115 was sort of academic.

Q At or in connection with your meetings or conferences with Mr. Sonnett or Mr. Cahill, or perhaps at the executive committee meeting of the 29th, you mentioned the

fact that the problem or the question of a sealed complaint was discussed. Do you remember your testimony in that regard?

A Yes, I remember it.

Q Did counsel at that time describe to you what consequences would flow from obtaining a Court order sealing the complaint?

A Well, I recall that counsel said that it would not be available to the public in the Clerk's office, and as a consequence, there would be no publicity on it. I don't recall much beyond that, Mr. Davis.

Q Do you recall whether or not he informed the meeting that if an order sealing the complaint was obtained TWA and its officers should not, in violation of such order, make the complaint available to outsiders?

A No, I don't recall any such discussion.

Q Was there any discussion at that meeting as to any plan for seeking to obtain an order for the examination [12144] of Mr. Hughes simultaneously with the filing of the complaint?

A I believe there was, Mr. Davis. I believe that was part of the package, so to speak, that Mr. Sonnett presented that morning.

Q Will you describe what was said in that connection?

A So far as I can recall, that it would be desirable to obtain a priority with respect to depositions, and that they hoped to—or that they planned to make a motion to obtain Mr. Hughes' deposition first, and that it was a matter of conjecture whether they would be successful or wouldn't be successful, but they thought it desirable to get the priority of deposition, if possible.

Q Was there any statement or comment made as to the nature of the desirability?

A Mr. Davis, I am not sure I understand your question.

Q Was anything said to describe or identify why it was desirable to obtain as soon as possible an order for the taking of the deposition of Mr. Hughes?

A I don't recall anything beyond what I have just testified to.

Q You are quite sure of that?

A That's correct.

[12145] Mr. Davis: May I have marked for identification as Defendants' Exhibit 116 a letter from Mr. Tillinghast to Mr. Haggerty under date of July 11, 1961.

(Photostat of letter dated July 11, 1961, to Mr. Harry Haggerty from Charles C. Tillinghast, Jr., marked Defendants' Exhibit 116 for identification, as of this date.)

Q Can you identify that as a letter which you wrote to Mr. Haggerty on July 11th?

A It is.

Q Did you have a telephone conversation with him relating to that subject matter?

A I did.

Q You enclosed a copy of the complaint?

A I did.

Q The preceding Friday, the Friday preceding July 11th, would have been Friday, July 7th.

Do you recall what you said to Mr. Haggerty?

A My recollection is, Mr. Davis, that my conversation with Mr. Haggerty was almost the same as that with Mr. Keehn, about which I have already testified.

Q Do you know what Mr. Haggerty said?

A My recollection is, Mr. Davis, that Mr. Haggerty had very little to say, beyond saying that this was very [12146] interesting, and appreciated my calling.

Q Why did you send a copy of that to Mr. Haggerty?

A For the same reason I sent one to Mr. Keehn, about which I have already testified.

Mr. Davis: May I have these handwritten notes marked as Defendants' Exhibit 117.

(Photostat of handwritten notes, dated 7/19/61, marked Defendants' Exhibit 117 for identification, as of this date.)

Q Look at Defendants' Exhibit 117, Mr. Tillinghast. They are notes which we obtained from the Bank of America, and they appear to be notes by Mr. Carver of a telephone conversation with Mr. Gordon in which Mr. Gordon described to Mr. Keith Carver Mr. Gordon's telephone conversation with Mr. Sessel, and you will note it is dated July 19, 1961.

You note in the first paragraph there is a statement "Tillinghast and Leslie will talk to banks next Tuesday." That is after making reference to the summer losses, et cetera.

Do you know whether or not you and Mr. Leslie talked to the banks on the Tuesday following July 19th?

A Well, I know, Mr. Davis, that we had a talk with the banks in the latter part of July. I think July 25th is the date, although I wouldn't be absolutely positive [12147] of it.

Q Will you please just identify the subject matters that were discussed at that meeting with the banks, and in so doing identifying who was present at that meeting?

A Oh, dear, Mr. Davis. Each of the banks had a representative. I am not sure that I could identify them each by name at this point.

Q You are referring to the banks involved in the 1960 financing?

A That's right.

Q What was the subject of discussion, the purpose of the meeting?

A Well, let me finish my—

Q Please do.

A And then each of the two insurance companies had a representative there. I remember Mr. Keehn was there. I am not sure who else from the Equitable. I believe there were a couple of people from the Equitable and a couple of people from the Met.

The purpose of the meeting was to discuss our financial situation, and the need to roll over some of our maturities in order to improve our year end cash position.

Q You notice that the next item is "This presumes that Toolco may have to come up with some money on its [12148] guarantee."

Do you recall a discussion at that time as to the possibility of the Tool Company having to come up with money on its guarantee?

A No, I do not.

Q Can you identify the guarantee this refers to?

A Well, I would only be speculating as to it, Mr. Davis.

Q You are not familiar with the provision in the 1960 financing under which the Tool Company gave a guarantee as to the working capital needed by TWA or for maintaining a particular level of working capital?

A I know there was such a provision, Mr. Davis, that applied until all of the Convairs had been delivered. Whether this refers to that or not, I can't be sure.

Q Now look at the next entry there, after the note which says "May not tell other banks," "knew HRH scared by Cahill lawsuit."

Did you have any discussion or participate in any meeting with Mr. Sessel indicating that Mr. Hughes was scared by the Cahill lawsuit?

A Well, Mr. Davis, we had a board meeting on the 19th of July, I believe, which is this day. At that lawsuit we discussed, among other things, the settlement [12149] negotiations that were then taking place with Mr. Bautzer, and I think that the view was expressed that Mr. Hughes appeared very, very concerned about the lawsuit, and looked as if he was making serious efforts to try to get it settled.

Q You see the next note, which is "But worse than expected."

Now will you tell me what was said or discussed at this board meeting on the 19th tending to indicate that Mr. Hughes was scared by the lawsuit but much worse than expected?

A Mr. Davis, I can't recall anything being said.

Q Isn't it true, Mr. Tillinghast, that one of the purposes of the lawsuit was to scare Mr. Hughes?

A No, Mr. Davis. The purpose of the lawsuit was to get some claims of TWA settled, and to bring an end to the warfare that then seemed to be going on, and our interest was in getting something settled, not in scaring Mr. Hughes.

Q Look at the next entry or sentence, "They," referring to the Cahill law firm, "have concluded if get him on stand would keep him there for two or three months."

Were you or Mr. Sessel or the board of directors ever told that?

[12150] A Oh, Mr. Davis, I am not sure of that. It may have been. It certainly would be my judgment that if he were on the stand he would certainly be there a matter of months before this whole thing was unraveled, at least judging by my own experience.

[12151] Q What I am trying to get you to tell us, Mr. Tillinghast, is what was said at the board meeting of the 19th or any meeting which you can recall at which Mr. Sessel may have been present.

A I don't recall, Mr. Davis. It is entirely possible, when speculated, that he would be on the stand for months once he got on, but I have no distinct recollection of it.

Q Do you recall what was said about the general strategy of starting a lawsuit, deciding upon an antitrust cause of action, getting an order to show cause for the deposition of Mr. Hughes, the advantages of forcing talks with the Tool Company, and the threat of what could take place in the lawsuit—you remember that kind of a discussion?

Mr. Sonnett: Mr. Rankin, that is obviously a misstatement of the entire record, and I object to it.

It also implies some reflection on the professional standing and ethics of myself and my firm, which I resent.

The facts are not as Mr. Davis summarized them. The evidence in this record is quite clear.

Insofar as Mr. Hughes is concerned, he will be on the stand for a good two or three months, and I make no secret of that, and never have. Like anybody else, he will submit to the procedures of the courts.

[12152] Mr. Davis, by putting argumentative and erroneous questions, is seeking to create a record which I intensely dislike.

The Special Master: I will sustain the objection to the form of the question.

Q Do you recall whether or not at this July meeting of the board a report was made that the lawsuit would be sealed until August 1, 1961?

A Yes, I am quite sure that the status of the sealing was reported to the meeting, Mr. Davis.

Q Do you recall also a report being made at that same board meeting as to the effect the lawsuit had had to date?

A On whom or what?

Q Was there a report to that effect made, a description by you or someone else at that meeting describing the effect that the filing of the complaint had had?

A Only, Mr. Davis, insofar as I have already testified. As I recall it, what was said at that time was that the institution of the action had been followed by very vigorous talks between Mr. Bautzer and Mr. Reed, that we had the impression that Mr. Hughes was very seriously concerned about the suit, and that real progress seemed to be made in coming to some sort of an understanding, that, having in mind Mr. Hughes' unpredictability, that it would be rash [12153] for anyone to predict what was going to happen, and that until we had a settlement that we shouldn't count on it, but that to that date things appeared to be proceeding seriously and constructively, and that there was at least a hope that we might get everything washed up and come out with a permanent settlement that would enable TWA to operate without the harassments which had marked the recent past.

Mr. Sonnett: Mr. Rankin, may I call to your attention, and for the sake of the record, the fact that on July 7, 1961 Judge Dimock of the Southern District entered an order which provided, in Paragraph 1, "The order of June 30, 1961 sealing the complaint and all other papers filed herein is hereby extended and the Clerk of this Court is directed to keep under seal the complaint and all other papers filed herein until 10:00 a.m. on August 1, 1961, subject to further order of this Court," and that that order was jointly applied for and consented to by my firm and by Mr. Davis.

Mr. Davis: That is part of the record in the file of the Court.

Mr. Sonnett: You have a poor recollection.

Mr. Davis: I have a very clear recollection, I can assure you, and maybe a better understand [sic] of what was taking place than you have.

[12154] By Mr. Davis:

Q Mr. Tillinghast, you previously testified that at the executive committee meeting of June 29th the report of the Cahill firm was to the effect that they had not yet completed their study.

Did there come a time when TWA was informed that they had completed their study?

A No, there was not, Mr. Davis.

Q You mean TWA to date has not been informed that they have completed their study?

A That is correct, Mr. Davis. This has sort of taken a backseat to some of the more exigent matters involved in the litigation.

Mr. Davis: May I have marked for identification a motion and supporting affidavit which was filed in the Delaware Court?

The Special Master: You may.

(Motion and supporting affidavit in the matter of Trans World Airlines, Inc. against Howard R. Hughes and Hughes Tool Company, in the Court of Chancery of the State of Delaware, In and for New Castle County, Civil Action No. 1607, dated May 25, 1962, marked Defendants' Exhibit 118 for identification, as of this date.)

By Mr. Davis:

[12155] Q Mr. Tillinghast, you have before you Defendants' Exhibit 118, and you will notice that there is attached to that an affidavit by Mr. Sonnett.

A Yes.

Q I particularly call to your attention the statement which appears in Paragraph 5 of that affidavit on page 4, the portion which, after referring to this pending action—

A Excuse me, Mr. Davis.

Q Paragraph 5 on page 4.

A Oh, yes.

Q It reads:

> "It will be apparent to the Court that the factual subject matter of the New York litigation is the same as that in the present case, although the New York litigation involves additional parties and additional subject matter relating to the antitrust and other issues there presented."

My question to you is whether or not you were aware of this affidavit.

A No, I was not, Mr. Davis.

Q Was the commencement of an action in Delaware discussed with you?

> Mr. Sonnett: I object to that as outside the scope of this deposition.
>
> [12156] The Special Master: Give us an idea of what you have in mind, how it is relevant, please.
>
> Mr. Davis: I will try another question.

Q Do you recall discussions with Mr. Reed as to the desirability or lack of desirability of commencing an action in Delaware rather than one in New York?

A No, I do not.

Q Do you recall being informed that Mr. Reed had seen and discussed a draft of a proposed complaint in the Delaware action with Mr. Sonnett or members of the Cahill firm?

A No, I do not.

Q You have previously testified, Mr. Tillinghast, as I recall, that prior to the meeting of June 7th you did not recall a telephone conversation with Mr. Breech as to the subject matter to be discussed at this meeting of June 7th.

A That is correct.

Mr. Davis: May I have marked for identification a memorandum dated June 7th, from Mr. Tillinghast to Mr. Leslie, as Defendants' Exhibit 119.

(Photostat of memorandum dated June 7, 1961, to A. V. Leslie, from C. C. Tillinghast, Jr., marked Defendants' Exhibit 119 for identification, as of this date.)

Q I hand you Defendants' Exhibit 119.

[12157] Mr. Davis: Mr. Special Master, may I also call to your attention that this is another document which we received for the first time on July 27th.

Q You recall in your prior testimony, when I showed you the list of telephone calls that you made or that your secretary had made up, which was previously marked as Defendants' Exhibit 108, you didn't seem to be too certain whether you had made a telephone call to Mr. Breech on June 6th or whether someone else happened to use that telephone in your office.

Looking at Defendants' Exhibit 119, you see that on June 7th you were telling Mr. Leslie that the day before you had had a telephone conversation with Mr. Breech in which "he raised the question of the extent of Hughes' stock in Atlas Corporation and Atlas' interest in Northeast."

Now does that refresh your recollection as to your telephone conversation with Mr. Breech on June 6th?

A No, it does not, Mr. Davis, except that it refreshes my recollection that on apparently June 6th I had a telephone conversation with Mr. Breech, which I recall in part, during the course of which he asked if I knew what was the extent of Hughes' stock interest in Atlas Corporation and the Atlas interest in Northeast.

Q What was the subject matter of that telephone conver- [12158] sation when this came up, Mr. Tillinghast?

A Well, I am not sure that I can recall, Mr. Davis. I rather think it related to the Northeast merger, although I wouldn't be positive.

Q Isn't it a fact that at that time you were discussing with Mr. Breech what facts could be put together to support a possible contention of a conspiracy with Atlas Corporation?

A No, Mr. Davis, I am quite sure that that was not the subject matter of discussion.

Q And you have now given us your complete recollection as to the subject matter of that telephone conversation with Mr. Breech on June 6th?

A I have. The only thing that I can really remember, Mr. Davis, is that in the course of a telephone conversation I think having to do with the Northeast merger, and it may have been that I told him that I was going to have a date with Mr. Stretch the next Monday, or perhaps I said that Mr. Stretch had called me and was pressing us to do something about the Northeast merger, but all I can recall is that in the context of some discussion of the Northeast merger he raised this question and asked me if I could get this information for him.

Q Don't you recall testifying that some of the facts of which you were aware tending to support the basis for the [12159] contention of a conspiracy or facts which might raise a serious question were the nature of Mr. Hughes' interest in Atlas Corporation, prior advances made to

Northeast which had turned sour—you remember your testimony along those lines?

A Yes, I do.

Q And it is still your recollection that at that time, when you were discussing this matter with Mr. Breech, you were preparing for a meeting with Mr. Stretch?

A No, I didn't say that, Mr. Davis. What I said was that it may have been that what brought the subject up was the forthcoming meeting with Mr. Stretch on the 12th of June or perhaps the fact that Mr. Stretch had called me and pressed me to do something about the Northeast question.

Q Are you prepared to testify that in that June 6th telephone conversation with Mr. Breech you were not discussing the basis for this antitrust claim or lawsuit against Hughes Tool Company?

A I am quite confident that that is the fact.

Q And you were not discussing with him the meeting that you were to have with him the next day on June 7th with Mr. Cahill and Mr. Sonnett?

A Well, now, I don't know about that, Mr. Davis. I haven't so testified. If, as appears to be the fact, I was [12160] having a meeting with them the next day, I may well have said that they were coming up the next day to give me a progress report. I just can't be sure of that.

Q Do you recall discussing with Mr. Leslie what the purpose was of this request?

A No, I do not recall discussing any of this with Mr. Leslie.

Mr. Davis: May I have marked for identification this memorandum from Mr. Leslie to Mr. Tillinghast under date of June 8th, and which appears to be the response to the request made by Mr. Tillinghast on June 7th.

(Photostat of memorandum dated June 8, 1961, to Mr. Charles C. Tillinghast, Jr., from A. V. Leslie, consisting of two pages, marked Defendants' Exhibit 120 for identification, as of this date)

Mr. Davis: For the record, Mr. Special Master, may I state that even though what has been marked as Defendants' Exhibit 120 is in fact what was received on July 27th, we had previously received a copy of not this one but of similar information prior thereto.

However, in the absence of the connecting link reflected by Defendants' Exhibit 119, it was not meaningful to us.

By Mr. Davis:

[12161] Q Mr. Tillinghast, can you identify what has been marked as Defendants' Exhibit 120 as the report you received from Mr. Leslie pursuant to your request of June 7th?

A I believe it to be that.

Q What did you do with it when you got this information or this report from Mr. Leslie?

A I sent a copy of it to Mr. Breech.

Q And that's all?

A That's all that I recall, except that I read it over, and except for reading it over and sending a copy to Mr. Breech, I don't recall I did anything with it.

Q Do you see what has been marked as Defendants' Exhibit 108 indicates that on June 8th, the date on which you received this memorandum from Mr. Leslie, you called Mr. Breech?

A I don't know whether I called Mr. Breech or not, Mr. Davis.

Q Do you want to look at Defendants' Exhibit 108, prepared by your secretary, indicating that you called Mr. Breech in Detroit, Michigan, on June 8th?

A I don't think that that indicates, Mr. Davis, that I called Mr. Breech. It indicates that Mr. Breech's telephone was called from that telephone. Whether I called him or not, I can't tell you.

[12162] Q June 7th was a day, as I recall your prior testimony, when TWA first considered a draft of a complaint, is that right?

A Well, that's not quite what I testified to. I think I testified that June 7th was the date when we met with Mr. Cahill and Mr. Sonnett and had a preliminary discussion of the situation, and that my recollection is that they had present at that meeting a draft of complaint, although I wouldn't be absolutely positive about the latter.

• • •

[12166] By Mr. Davis:

Q Mr. Tillinghast, I am interested in developing now as accurately as possible the events which preceded this meeting on June 7th, at which time the Cahill firm presented to those attending the meeting a draft of a complaint. Do you recall when it was that the Cahill firm was requested by TWA to prepare a draft of a complaint?

A Mr. Davis, I don't recall that the Cahill firm was asked by TWA to prepare a draft of a complaint.

Q My recollection is that you testified that you met with Mr. Olds in March, on March 7th, at which time there was some discussion about the selection of special counsel, and subsequently there was a decision to retain the Cahill firm. Who participated in that decision?

A I am not sure that I altogether know, Mr. Davis.

Q What have you been told?

A I did not. Mr. Olds did, I am sure. Whoever the other member or members of the committee were, that escapes me at the moment, undoubtedly participated in the decision.

Q What meetings or conferences had there been held prior to June 7th relative to the result of this investigation or the institution of this action?

A Well, I am not sure, Mr. Davis, that any had been [12167] held. It may be that I had a discussion with them before this.

Q Let me refer you to your calendar of the Wednesday, April 5th, where at 12:30 you met with Mr. Cahill. Can you tell me what that was about?

A My recollection is, Mr. Davis, that I had lunch with Mr. Cahill and Mr. Sonnett.

Q Anyone else?

A Of a more or less social nature at the Rockefeller Center Luncheon Club on April 5th, if that is the date, and I think it is. I take that from my calendar. I have no independent recollection of it.

Q Did anyone else attend?

A As far as I can recall, there were only the three of us. I had not seen Mr. Cahill for years and years, nor had I seen Mr. Sonnett for at least 20-some-years. As I remember the event, it was more a social get acquainted lunch than anything else.

Q Was there any discussion of the lawsuit?

A I am sure there was no discussion of the lawsuit, because that was long before there was any lawsuit to talk about.

Q Was any arrangement made for investigating the facts?

[12168] A I knew at that time that they had been selected for this purpose. My recollection at the luncheon is that it was a get acquainted luncheon, and not much more.

I am sure they must have talked about what they were planning to do, and whom they were planning to see, but it doesn't stick in my mind at this point.

Q Do you recall when the next time was that you had contact or communication with anyone from the Cahill firm?

Mr. Sonnett: Mr. Rankin, I have no objection if it is going to save time for Mr. Davis to go through this business. I think what he is seeking to get into is privileged. If we can get through the exercise promptly, since we only have several hours to go, I am not going to be technical about it, but I do think we are wasting time on a line that Mr. Davis must know is privileged.

By Mr. Davis:

Q Will you answer my question now, Mr. Tillinghast. May I refer you to your calendar under the date of Friday, May 12th, which indicated that at 4 o'clock you met with Mr. Sonnett?

A Yes, I see that, Mr. Davis.

Q May 12th was a date prior to any communication that you received from the Tool Company relating to this [12169] Boeing matter, and related matter that you previously testified to?

A As a matter of fact, it happens to be, if I recall correctly, the day after we first received a communication through Mr. Forrester of the Tool Company's asserted interest in selling their subordinated debentures.

Q Did you have a meeting with Mr. Sonnett on that day?

A I see it on two calendars here, Mr. Davis, and I presume I must have.

Q You don't recall doing so?

A I don't recall the meeting.

Q You don't recall who else may have been present at that meeting?

A No, I do not. I am sorry, but that just doesn't come into mind.

Q Do you recall anything that developed so far as you are concerned, relating to the subject matter discussed on June 7th, prior to June 7th?

A No, I do not, Mr. Davis.

Q Do you know if Mr. Breech or Mr. Reed had discussions with the Cahill firm on that subject matter?

A So far as Mr. Reed, I just don't know.

So far as Mr. Breech is concerned, I very much [12170] doubt that after I became president, he had any communications with the Cahill firm in which I did not participate. Maybe I am wrong, but I don't think so.

Q Who arranged that June 7th meeting? You may have told me, but I have forgotten. Was it you who arranged that meeting at June 7th?

A I believe I arranged it, yes.

Q Do you recall if it was something you requested prior to June 7th?

A My recollection is that Mr. Sonnett called me and said that they had some tentative views that they wanted to express, and that they would like to come up and sit down and discuss them.

Q You previously testified that at that meeting of June 7th a draft of the complaint was presented and discussed.

A Mr. Davis, I don't know how much more times you want me to go through this. I have testified, I believe, that I have a vague recollection that there was a draft of complaint at that meeting, but I am not altogether positive of it.

* * *

[12207]

* * *

Q My question to you, Mr. Tillinghast, still is whether or not you ever had a discussion with Mr. Rowe as to whether or not in fact the Tool Company made available to TWA whatever planes were made available to TWA through the Tool Company, at cost to the Tool Company?

A I cannot elaborate, Mr. Davis, on the testimony that I have just given on that subject.

Q It is a fact, is it not, that it was Mr. Rowe or his firm which prepared and submitted to the CAB applications for the approval of each of those transactions?

A I believe so.

Q And it was the fact that the CAB had approved those transactions which was a subject of that discussion at the June 7th meeting, which Mr. Rowe described as creating, or you described as a so-called CAB problem?

A That is right.

Q But you never attempted to inquire from Mr. Rowe [12208] or anyone else whether factually it was so, is that correct?

A Mr. Davis, I don't recall anyone ever having attached any significance to the question of whether the planes were supplied at cost or some other figure in the context that you are now asking the question.

Q At this June 7th meeting, or this June 12th meeting, did anyone ask a question as to what were the facts to establish the type of business that the Tool Company was in, which was subject to monopolization, as charged, or in relationship to those paragraphs of the complaint.

A I don't recall anyone having asked any question on that score, Mr. Davis. As I recall it, it was spelled out pretty clearly in the complaint and in the drafts, and I don't recall anyone having asked any particular questions about that part of it.

Q Do you recall what was said in connection with those paragraphs of the complaint which define or attempt to define the line of commerce allegedly monopolized?

A Do I remember what was in the complaint?

Q No, what was said.

A I don't recall anything being said, Mr. Davis. My recollection is that so far as those parts of the complaint are concerned, that they were described by counsel and no one challenged any of the facts therein stated.

[12209] Q Following this meeting or conference on June 21st, there was the so-called Yale Club meeting?

A That is correct.

Q Can you by looking at your calendar or your secretary's calendar tell us approximately when it took place prior to June 29th?

A Not beyond the testimony I have already given.

Q At one point you indicated that you thought it was around the 26th or the 27th. That is your best recollection?

A That is my best recollection.

[12210] Q What was the purpose of that meeting?

Mr. Sonnett: In addition to what is already in the record?

A I don't believe I can add anything to what I have already testified to, Mr. Davis.

Q At that meeting, Mr. Surbeck, one of Mr. Reed's partners attended?

A That's correct.

Q Who suggested that Mr. Surbeck should attend?

A I believe Mr. Reed did.

Q Did he tell you? Did he ask you for permission to bring Mr. Surbeck? Will you explain how that meeting came about?

A My best recollection, Mr. Davis is that Mr. Reed called me and said he would very much like an opportunity for Homer Surbeck to sit down and go over this complaint and discuss it with us.

Q Isn't it a fact that Mr. Reed, prior to that time, had expressed to you some concern as to the validity of a contention of a violation of the antitrust laws?

A No, I don't think that's correct, Mr. Davis. Mr. Reed did, as I recall it, in the early stages of this share some of Mr. Rowe's questions about just how far and to

what extent the CAB action would be an umbrella on what [12211] was done, but except for that I don't recall Mr. Reed having expressed that point of view.

Q I would like you to be as clear as you can, and indicate if you are quite clear, just who did attend that meeting.

A Which meeting?

Q We are now talking about the Yale Club, on June 26th or June 27th.

A As to those of whom I am sure, there were Mr. Reed, Mr. Surbeck, Mr. Sonnett, Mr. Rowe and myself, and if there was anyone else such as possibly Mr. Marshall Cox, I am not sure about it. I am sure of the five.

Q At that meeting which draft of the complaint was the subject of discussion?

A The draft that was before that meeting.

Q I understand that, but was that a revision of the draft which had been presented at the June 21st meeting, or was it a substantially new draft?

A My recollection is that some revision had taken place since the meeting of the 21st.

Q Some revision had taken place?

A That's correct.

Q Do you recall the nature or extent of those revisions?

[12212] A No, I don't know, Mr. Davis. My feeling is that the revisions between the 21st and the particular meeting weren't very great, but I know there were some, and I am sorry I can't just recall them.

Q This difference of opinion or point of view had previously been discussed with Mr. Reed on June 7th, is that correct?

Mr. Sonnett: I object to the form of the question. There is nothing in the record that indicates

a difference of opinion or difference of a point of view at all.

By Mr. Davis:

Q The problem or the matter which was concerning Mr. Reed to make him want to have Mr. Surbeck attend, had been the subject discussed at the June 7th meeting?

A It was one of the subjects discussed at the June 7th meeting, I believe.

Q Did Mr. Reed indicate that he wanted to pursue that subject further, or why the necessity for another meeting with Mr. Reed?

A I don't recall, nor do I think that Mr. Reed indicated that he wanted to explore that subject specifically. My recollection rather is that Mr. Reed felt that this was a fairly important step so far as he was [12213] concerned, and he wanted to have a discussion of this with Mr. Surbeck to satisfy himself that it was an appropriate step to be taken.

Q What do you mean by "a discussion of this"?

A The bringing of this action.

Q The bringing of any action, or the bringing of an antitrust action as against bringing some other type of action?

A The commencement of the action which was then under very serious consideration.

Q It is in fact true, Mr. Tillinghast, that what Mr. Reed was saying was that he wanted to review this matter with Mr. Surbeck because it was couched in terms of alleged violations of the antitrust laws, rather than a cause of action for breach of contract, or breach of fiduciary obligation, or the like?

A That is neither right nor wrong, Mr. Davis. Mr. Surbeck is particularly an antitrust expert, and I am sure that one of the reasons why Mr. Reed wanted Mr. Sur-

beck to review this thing is because it was an antitrust action.

However, he did not say anything, that I can recall certainly, that sounded very much like what you have just said. [12214] Q Is it fair to say that this meeting of the Yale Club was held primarily at the suggestion of Mr. Reed?

A That is my recollection.

Q Now will you tell us as fully as you can what took place in that discussion?

A Without repeating what I have already said, Mr. Davis, the only thing that I can recall that came up which I may not already have covered is the matter of Mr. Reed's assurances to Mr. Bautzer, and the procedure of sealing the complaint, if we could.

I remember at that meeting asking Mr. Reed just what the nature was of his commitment to Mr. Bautzer relative to talking with him before a complaint was filed. I recall that he said that he had no real commitment. That all that he had done was to give Mr. Bautzer the assurance that he would do what he could to discuss the matter with him before a complaint was filed.

I asked him whether or not he felt that our filing of a complaint without his first having talked with Mr. Bautzer would put him in a difficult or impossible personal position, and he said that it would not.

My recollection is that Mr. Sonnett talked about some other case in which I believe his office had had some success in getting a complaint sealed, and suggested that [12215] if we could succeed in doing this, it would be possible for him to accede, in substance at least, to Mr. Bautzer's request, while not running the risk of having an action filed by you, or having you do something else against which we would be in a sense defenseless as part of the pressure campaign that had been going on.

I remember discussing with Mr. Reed the question of when he really thought that anything would come out of

any discussions with Mr. Bautzer, or whether or not this would merely be a repetition of the abortive attempts that had been going on for some period of time to find a basis for accommodation with the Tool Company.

I remember his saying that he thought Greg Bautzer was sincere, and that if it were clear that we really meant business, that there was at least a very good chance that something constructive would come out of his discussions with Greg Bautzer.

That, Mr. Davis, is everything I can recall, other than what I have already testified to in your questioning me before about this meeting.

Q You seem to have a rather fair recollection of Mr. Reed's remarks relating to Greg Bautzer. What is your recollection as to the remarks made by Mr. Surbeck relative to the facts which justified or which failed to [12216] justify a complaint?

A Mr. Davis, again I don't recall any substantial discussion of the facts. Indeed, I believe I recall Mr. Sonnett having said, or perhaps it was somebody else, that there really wasn't any issue as to the facts. The issue was as to what the legal effect of the facts was.

Q Will you tell us what were the facts which Mr. Sonnett or Mr. Surbeck or anyone there present felt were the facts which were not subject for dispute, but which formed the basis for a legal determination?

A The facts alleged in the draft of complaint.

Q I am interested in what was said, Mr. Tillinghast. I appreciate that you may find it a little difficult to concentrate on that, but if there was a discussion of fact what do you remember being said—whether it was a question of fact, or a question of law.

Mr. Sonnett: I object to the speech, and I move the last comment be stricken as wholly inappropriate.

The Special Master: It may be stricken.

A Mr. Davis, I just have to say once again that I have testified as fully with respect to that meeting as I can presently recall.

Q I am trying to get more than that. Mr. Surbeck [12217] attended the meeting for a purpose. You just testified about that. I don't believe that you previously testified, and if I am wrong, I will apologize, but I don't believe that you have testified as to what Mr. Surbeck said at that meeting.

A Mr. Davis, I covered it in my prior testimony as best I could recall it.

Q Has it been suggested to you that it would be better not to remember too much about that meeting?

A No, it has not, Mr. Davis. I can assure you.

Q Do you recall a discussion as to the probabilities or lack of probabilities of being able to obtain an order of the Court sealing the complaint?

A Yes, and I have testified as to that.

Q Tell me what was said about the kind of application which you would have to make to the Court, or what was said about it other than the fact that it was mentioned.

A I believe, Mr. Davis, and this is very hazy in my mind, that Mr. Sonnett described very briefly the kind of application that he would propose to make. As I recall it, he proposed to premise it on two things. One, the damage to the airline of a publication of this dispute, and secondly, the desire of the parties to discuss a possible accommodation.

[12218] Q By accommodation you mean settlement?

A Yes.

Q Is that all you remember that was said in that connection?

A Yes, it is.

Q Do you recall what comments either Mr. Rowe or Mr. Surbeck or Mr. Reed made along those lines?

A Merely that it was good if you could get it.

Mr. Davis: Mr. Special Master, the file records do not reflect the filing of whatever application was made before, I believe, Judge McManus for this ex parte order. At times I believe I understood Mr. Sonnett to state on the record that it was based on some affidavit.

May I request at this time that whatever papers were submitted to Judge McManus on the application for this order be produced, or filed as part of the Court records?

Mr. Sonnett: You have had them. You have had them since about half hour after the case was filed, after you got word you were going to be served, you ducked out and didn't come back. You have had the order to show cause. You have had the affidavit and you have had the complaint.

[12219] Mr. Davis: Am I to take that as a statement for the record that the Court files reflect whatever was submitted to Judge McManus?

Mr. Sonnett: Take it any way you like. There were no other papers submitted to the Court. I just told you you got all the papers.

Mr. Davis: The affidavit referred to was not furnished to us, and is not part of the Court record now.

Mr. Sonnett: The affidavit was submitted as well in the order to show cause, for getting an early examination of Mr. Hughes and temporary injunction, but you fortunately saw the light and laid off.

By Mr. Davis:

Q With that statement of your counsel to refresh you, Mr. Tillinghast, do you recall at this meeting the discussion that was had with respect to making an application for the

examination of Mr. Hughes, simultaneously with the filing of the complaint?

A I don't recall, Mr. Davis, any particular discussion of it at that time. Undoubtedly it was touched on to some degree.

Q As a matter of fact, the discussion turned around the strategy to be followed in connection with the filing [12220] of this complaint, isn't that right?

A No, I don't think so, at least as I understand your question, Mr. Davis.

Q You mean you don't understand what I mean by "strategy"?

A I am not sure just what you mean to connote about it.

Q I mean to connote what was in fact discussed, Mr. Tillinghast.

A. Mr. Davis, I don't, as I say, recall any particular discussion of it at this time. I am sure, as I have already testified, the matter of an application to seal the complaint was discussed. As I recall it, this was all against the background of facilitating Mr. Reed's discussions with Mr. Bautzer, and putting him in a position whereby on the one hand we would not run the risks that we would run if we hadn't started the suit, and on the other hand, he would be as free as possible to carry out those things that Mr. Bautzer was requesting him to do.

My recollection of the order to show cause, and the examination and everything else, was that we were trying to get our ducks in a row, so that there was no chance of our being scooped or prejudiced by going through the period of delay which would be involved in Mr. Reed's [12221] talking with Mr. Bautzer. I am not sure that answers your question, but that is my best recollection of the matter.

Q Are you saying, among other things, that Mr. Reed had been discussing with Mr. Bautzer the commencement

of this action?

A No. Mr. Reed had not been, so far as I know at least, discussing with Mr. Bautzer the commencement of this action. Mr. Bautzer, as I understand it, had several times said to Mr. Reed that before this—or that when this special committee had made its report, and before TWA did anything, he hoped that he could sit down with Mr. Reed and discuss the problem, and hopefully work out some settlement of it so that there wouldn't be the need for any action.

What we were aiming to do in this whole matter was to put this thing in a posture, where as I say, we wouldn't be prejudiced by any delays, but Mr. Reed would be in a position to explore with Mr. Bautzer what it was that Mr. Bautzer wanted to talk about.

Q Was there any discussion as to the probable reaction of Mr. Hughes if Mr. Sonnett were successful in obtaining an order to show cause for the taking of the deposition of Mr. Hughes?

[12222] A Mr. Davis, I don't recall any particular discussion of that. I would say I am sure, I think, it is very likely somebody commented on the fact that Mr. Hughes wouldn't be very happy, but I really don't recall any particular discussion about it.

Q Do you have a general recollection as to what was said in that connection?

A Not beyond what I have already testified to, Mr. Davis.

Q You discussed it with Mr. Sessel and Mr. Slack, didn't you?

A What?

Q The probable reaction of Mr. Hughes of what he would be likely to do rather than forced to testify?

A I don't recall discussing that with Mr. Sessel and Mr. Slack, except at one of the board meetings in July,

I think it was, when we were discussing settlement of the action.

Q Isn't it a fact that this meeting, one of those present said "This lawsuit will never go to trial because Mr. Hughes will be forced to settle this before we will be faced with that necessity"?

A Not that I recall, Mr. Davis.

Q Would you recall it if it had been said, in sub- [12223] stance?

A I think very likely I would, but I don't recall.

Q Do you recall at the meeting Mr. Sonnett reporting that he had not completed his investigation of the facts?

A I am sure that in the course of the conversation Mr. Sonnett said, or somebody pointed out at that meeting that that was the fact. That the investigation of the facts hadn't been completed so far as it related to so-called equitable causes of action.

Indeed, I believe it was at that meeting, I think Mr. Sonnett observed, as he had once before, or at least once before, I guess several times before, that the relief that would be obtainable in an antitrust action would, in fact, make TWA whole for any damages that it had suffered, and that the best people were defendants in antitrust actions, and that he felt that one of the reasons for bringing an antitrust action was that it didn't have the social approbriums [sic] attached to it that some other types of action did, and he thought Mr. Reed's chances of working something out with Mr. Bautzer would be improved rather than diminished if we avoided anything that would point an unpleasant finger at Mr. Hughes personally.

Q Did anyone suggest at that meeting that before making any final decision as to the kind of action to [12224] bring, the investigation should be completed?

A No.

Q What was the conclusion of the meeting?

A I think the conclusion of the meeting so far as Mr. Reed and Mr. Surbeck were concerned, was that Mr. Surbeck said in substance "I think you have got a good cause of action."

Q Then was there a discussion about the timing of the filing of it, or what was to be done following the meeting?

A I don't recall any discussion of timing, Mr. Davis. There may have been, but it doesn't come to mind at the moment.

Q Was it at that meeting that it was decided it would be desirable to call a meeting of the executive committee?

A Not that I recall.

Q How soon after that meeting did you call this?

A That I can't tell you. Whether or not the executive committee meeting had already been called, or whether it was called after this meeting, I am not sure. I rather think that it was called after this meeting was concluded, but I am not actually positive about it.

Q Who asked Mr. Sonnett or his firm for an opinion letter?

[12225] A I am not sure that anyone did, Mr. Davis.

Q You mean it just appeared at the executive committee meeting?

A No. As best I recall it, when I was discussing that meeting and Mr. Sonnett coming to that meeting, he volunteered that he would be prepared to give TWA some sort of a letter to the effect that while their investigation wasn't complete, in their opinion we had a proper claim with respect to the matters included in the complaint.

[12226] Q Was there a discussion at that meeting as to the possibilities of an action in Delaware on a so-called equity cause of action?

A I am not sure, Mr. Davis. I don't think so, but I don't want to be positive about it. My recollection is that during this period of time there was no serious discussion

of an action in any jurisdiction other than New York, but that in the course of discussing some of the possible alternatives, there may have been some mention of other jurisdictions, and there may have a mention of Delaware, but I am quite positive that there was no serious consideration of the institution of a Delaware action at the time we are speaking of.

Q Did Mr. Reed tell you of having seen and discussed with Mr. Sonnett a draft of an action in Delaware—a draft of a complaint for filing in Delaware?

A Mr. Davis, I have a recollection that during the course of some of these meetings, and I couldn't place it in point of time, Mr. Sonnett's office did in fact come up with a draft of an equitable cause of action, of a non-antitrust variety, but I don't recall it as having been particularly a Delaware cause of action. Maybe I am wrong on that, but that is my best recollection.

Q Do you recall what discussion there was as to the pros and cons of such a cause of action, other than what [12227] you have already described, which took place at either of those three meetings?

Mr. Sonnett: And other than with counsel?

Mr. Davis: I am not excluding counsel, Mr. Sonnett.

Mr. Sonnett: I think you better get specific as to what meetings you are talking about.

By Mr. Davis:

Q I am asking you if you recall having had a discussion as to the pros and cons with Mr. Reed or Mr. Surbeck, or with anyone else—first with Mr. Reed or Mr. Surbeck—at any one of those meetings which you have now described?

A Did you finish the question?

Q The pros and cons of this other cause of action versus this antitrust cause of action.

A I am sure, Mr. Davis, that in meetings with Mr. Reed we discussed the pros and cons of other types of action other than an antitrust type.

Q Tell me what was said pro and con.

A Well, at the risk of repeating myself—

Q You don't need to repeat anything you have already said, unless you want to.

A Mr. Davis, it is sometimes difficult to remember exactly what I have said, and exactly what I haven't said, [12228] and it will be easier for me to answer this, with your indulgence, if I try to cover the whole subject.

As I have testified at least in part, the problems raised, or the objections to an equitable cause of action was in part the complications of proof.

Secondly, the fact that it would get very personal so far as Mr. Hughes is concerned.

Thirdly, that the damages probably would be less than in an antitrust cause of action by reason of the lack of trebling.

Fourth, that while injunctive relief would be available, you probably did not have as clear a pattern set for the type of relief that would really take care of this situation as you did in the antitrust line of cases.

Q Who was saying all that?

A Mr. Sonnett, I would say, was saying most of this, although in a general discussion of a thing like this, Mr. Davis, it is impossible for me to completely and accurately sort out in my mind just who said what and who said something else.

I remember one other thing, that I maintained, I know, in one of these discussions, I think in the early discussions, that if someone having control of a corporation made it impossible for the management to function in a nor- [12229]

mal and effective way, by reason of usurping certain management functions, or by reason of other acts, that that would, I thought, give rise to an equitable right to damages and injunctive relief in the corporation that was injured by this. I remember that is one of the specific things that we discussed, and one of the things as to which the lawyers expressed doubt as to the ability of proof, and difficulty of proof of establishing what in a sense seemed clearly to be the case, and felt that you just get bogged down in the argument of a thousand subsidiary issues that would make it very difficult to try.

Q My question was intended to reach discussions that you had with Mr. Reed, not necessarily at those meetings, but related to the same subject matter.

A Mr. Davis, I did have other discussions with Mr. Reed, as I recall it, rather brief and casual ones, on the telephone from time to time, but I can't recall anything specific that I haven't already testified to.

Q I note from the calendar kept by your secretary that on the 29th, at 9:30 in the morning, you met with Mr. Sonnett and Mr. Rowe.

Can you tell me what took place at that meeting?

Mr. Sonnett: I object to the pending question.

The Special Master: Isn't that privileged? How [12230] do you reach that?

Mr. Davis: Mr. Special Master, it is my position at this point that the entire subject of this lawsuit, if they discussed something other than the bringing of this action, or the facts relative to it, or the desirability of bringing the action, that the privilege has been waived any number of times. I believe it is fair to assume that having had this meeting on the 26th or 27th, that when they met again on the 2nd, before the executive committee meeting, it was for

the purpose of pursuing what had been discussed at the prior meeting.

The Special Master: I will sustain the objection. You may inquire as to the foundation matters to see if there is something other than legal advice involved.

By Mr. Davis:

Q Isn't it a fact, Mr. Tillinghast, that on the morning of the 29th you met with Mr. Sonnett and Mr. Rowe—who else was at that meeting, by the way?

A I don't believe that anyone was.

Q Wasn't that to discuss the matters that were to be brought, and how they were to be brought at the executive committee meeting called for that day?

A No, Mr. Davis, that was not the case.

[12231] Q You weren't discussing the lawsuit and the complaint against the Tool Company?

A That is another question.

Q Did you meet for the purpose of discussing the complaint or the cause of action to be brought against the Hughes Tool Company and Mr. Hughes?

A Perhaps I can state it accurately this way, Mr. Davis: Mr. Rowe and Mr. Sonnett came up with copies of the papers which were to be presented to the executive committee meeting later that morning. I took copies of the complaint and gave them to each of the other people, officers or directors of TWA, who were going to participate in the executive committee meeting.

I then sat down, as best as I recall it, and read through the papers from beginning to end, and occasionally asked Mr. Sonnett and Mr. Rowe questions about the papers, and received their comments.

Q What were the papers that you were considering at that meeting?

A Well, they were the complaint in at least almost final form. I think also the papers on the order to show cause.

Q And to obtain the sealing of the complaint?

A That is correct.

[12232] Mr. Davis: Now, Mr. Special Master, may I inquire into that meeting on the ground that the attorney-client privilege in that area has been waived?

Mr. Sonnett: I think if he puts a specific question, we will get along a lot further, instead of approaching it blindly, and general approaches.

The Special Master: You go ahead and I will rule on any objection.

By Mr. Davis:

Q Will you describe what you said and what they said at that meeting relative to the papers to be presented to the executive committee meeting?

A Mr. Davis, I can't recall specifically anything that came up at that session. I remember generally that Mr. Sonnett called my attention to some changes that had been made in the complaint since the meeting with Mr. Reed and Mr. Surbeck by way of further refinement, but I can't recall specifically what those were, or specifically anything that was said in the course of that conference.

Q Do you recall what your questions were?

A No, I do not at this moment.

Q Will you look at the letter from Mr. Sonnett, or the Cahill firm, to you, dated June 27th, which has not been made available to us on the ground of privilege.

[12233] Mr. Sonnett: May I ask the purpose for which he wants the witness to look at the document?

Mr. Davis: To refresh his recollection.

Mr. Sonnett: As to what?

Mr. Davis: As to what it contains.

Mr. Sonnett: I don't think the witness has to look at it for the purpose of refreshing his recollection as to what it contains.

Mr. Davis: First I want him to refresh his recollection by having that before him.

Mr. Sonnett: I think what you want and what is proper are two different things. If you will put a question, which is the only way I know of, of proceeding to take a deposition. Let us see where we go from there.

Mr. Davis: May the witness have—

The Special Master: You might ask if he has any independent recollection if it.

By Mr. Davis:

Q Do you have an independent recollection of the contents of that communication, Mr. Tillinghast?

A In a general way.

Q Does it refresh your recollection in any way with respect to what took place at this meeting at the Yale Club?

[12234] A No.

Q By refering to that can you identify when that meeting at the Yale Club took place, whether it was on the 26th or the 27th of June?

A I doubt it, Mr. Davis. I don't believe that would help me in that regard.

Q Do you recall what time of the day that meeting at the Yale Club took place?

A Yes. It was about 6:00 o'clock in the evening.

Mr. Davis: May I have marked for identification as Defendants' Exhibit 125 this telegram dated June 27, 1961, at 3:00 p.m.?

(Telegram dated June 27, 1961, at 3:00 p.m., marked Defendants' Exhibit 125 for identification, as of this date)

By Mr. Davis:

Q Referring to Defendants' Exhibit 125, does that refresh your recollection as to when you asked Mr. Duckworth to send a call for a meeting of that executive committee meeting?

A I am sure it was shortly in advance of the time of the sending of this telegram, which was apparently 3:00 p.m. on June 27, 1961.

Q Wasn't that in fact a call that you made following [12235] your meeting at the Yale Club?

A Mr. Davis, I cannot answer that because I am just not sure whether this was before or after the Yale Club meeting.

Q You mean prior to the meeting of the Yale Club you had decided to call a meeting of the executive committee to act upon this authorization that you were seeking?

A I just have to say I am not sure, Mr. Davis.

Q At this meeting at the Yale Club, was there a discussion as to the basis for a determination of the damages under this so-called antitrust cause of action?

A I don't recall it, Mr. Davis, if there was.

Q Do you recall discussing with Mr. Breech the result of that meeting at the Yale Club?

A At the Yale Club?

Q The result of the meeting at the Yale Club, yes, which took place on either June 26th or June 27th?

A I am sure I must have, Mr. Davis. I can't tell you exactly when; but as I have testified before, I am sure I talked with Mr. Breech before this executive committee meeting and told him we were going to hold the meeting.

I am quite certain that at that time I told him that we had had a session with Mr. Reed and Mr. Surbeck, and that they were satisfied with the complaint, but I can't tell you exactly when it was that I talked with Mr. Breech.

[12236] Q Do you know whether or not Mr. Reed discussed it with Mr. Breech?

A I have no knowledge of that, Mr. Davis. If I did know, I have forgotten.

Q Was there any discussion at any time as to the desirability or lack of desirability of discussing this matter with the insurance companies or the lending institutions?

A I think there probably was, Mr. Davis, although I don't at the moment recall specific discussions, but I am sure there must have been.

Q You do not know what the nature of it was?

A I know I had a very strong view that this was something for TWA to make its own mind up on, and not to consult the financial institutions about, and I am sure I must have expressed that on various occasions, and I am quite sure counsel agreed with me on that.

Q Whom are you referring to by "counsel"—Mr. Rowe or Mr. Sonnett?

A Both. But I just couldn't tell you honestly when it was that I spoke to them, if I did, and as I am sure I must have, and just what they said.

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End of Volume I